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Supreme Court of the United States

October Term, 1965

No. 258

ROBERT D. SPIEGLE and DORIS LORRAINE SPIEGLE, his wife,

Petitioners,

vs.

BOROUGH OF BEACH HAVEN, in the County of Ocean, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Supreme Court of the United States

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vs.

BOROUGH OF BEACH HAVEN, in the County of Ocean, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Robert D. Spiegle and Doris Lorraine Spiegle, his wife, who reside at 1013 Sharpless Road, at Melrose Park, in the Township of Cheltenham, County of Montgomery, and Commonwealth of Pennsylvania, respectfully shows:

A.

They respectfully seek a writ of certiorari to the Supreme Court of New Jersey which entered a judgment on the opinion of Justice Haneman, a copy of which is appended hereto and which is reported in 46 N. J. 479 (1966). The Judgment of the Supreme Court of New Jersey affirmed judgments of the Superior Court of New Jersey entered on February 26, 1965, by Judge Elvin R. Simmill, which judgments were unreported and which are printed

in Petitioner's appendix submitted herewith at page 37a and page 56A respectively. Two cases were pending before Judge Simmill involving the same parties hereto and the same subject matter, which suits were consolidated before the Supreme Court of New Jersey.

B.

I. The date and time of entry of the judgment of the Supreme Court of New Jersey, sought to be reviewed is March 21, 1966.

II. No order respecting a rehearing has been sought or allowed. Neither has any order granting an extension of time within which to petition for certiorari been sought or allowed.

III. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C.A. 1257 (2), 62 Stat. 929; and 28 U.S.C.A. 1257 (3), 62 Stat. 929.

C.

The questions presented for review are:

1. Do Ordinances No. 62-10 as amended by No. 62-14, and No. 63-4 as amended by Nos. 63-5 and 64-17, as duly adopted by the Borough of Beach Haven, Respondents herein, and as applied to the Petitioners, and the property which they own in the Borough of Beach Haven, violate the Fourteenth Amendment to the Constitution of the United States as a taking of private property for public purposes without just compensation and as the deprivation of property without due process of law?

2. Is Ordinance No. 63-4 as amended by Ordinances Nos. 63-5 and 64-17, as adopted by the Borough of Beach Haven, respondents herein, so vague and indefinite as to

deprive the Petitioners of their liberty and property without due process of law in violation of the due process of law clause of Section I of the Fourteenth Amendment of the Constitution of the United States?

D.

The constitutional provisions which this case involves are as follows:

> "Amendment XIV:
>
> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Ordinances of the Borough of Beach Haven with which this case is concerned are as follows:

> ORDINANCE No. 62-10
>
> An Ordinance Restricting Fences and Other Structures on Private Beaches in the Borough of Beach Haven and Providing Penalties for Violation Thereof.
>
> The Board of Commissioners of the Borough of Beach Haven, in the County of Ocean, do Ordain:
>
> SECTION 1. Hereafter it shall be unlawful for any person, firm or corporation to erect, to cause to be erected or to maintain on any privately owned beach in the Borough of Beach Haven, east of the dune line as established by the Borough's engineers, any fence, wall, post, piling, stake, or structure of any sort which interferes with the unobstructed use of such beach by the public or which will in any way interfere with or impede any public official, public employee or contractor employed by any public body

in the performance of work on any such beach to repair or prevent storm damage, without first obtaining a permit therefor from the Board of Commissioners of the Borough of Beach Haven.

SECTION 2. The permit referred to in Section 1 hereof shall be issued only after public hearing at a regular meeting of said governing body held at least seven days after publication of notice of such hearing in the Beach Haven Times.

SECTION 3. The notice required by Section 2 of this ordinance shall be published at the expense of the applicant and shall specifically state the location and the erection which the applicant desires.

SECTION 4. This ordinance shall not be construed to prevent surveyors from placing survey stakes to survey property boundaries, provided such stakes are of no greater dimensions than 2" by 2" and not more than 2 feet high.

SECTION 5. Each violation of this ordinance shall be punishable by a fine not exceeding $200 or by imprisonment not exceeding thirty days or by both such fine and imprisonment.

SECTION 6. This ordinance shall take effect upon its final passage and publication as provided by law.

ORDINANCE No. 62-14

An Ordinance to Amend the Ordinance Entitled "An Ordinance Restricting Fences and Other Structures on Private Beaches in the Borough of Beach Haven and Providing Penalties for Violation Thereof".

The Board of Commissioners of the Borough of Beach Haven, in the County of Ocean, do Ordain:

SECTION 1. Ordinance No. 62-10 of the Borough of Beach Haven, the title of which is set forth in full in the title hereof, is amended to eliminate from Section 1 thereof the words "which interferes with the unobstructed use of such beach by the public".

SECTION 2. This ordinance shall take effect on final adoption and publication as provided by law.

Ordinance No. 63-4

An Ordinance to Define and Delineate the Beach and Dune Areas of the Borough of Beach Haven, and Establish Regulations for the Use and Protection Thereof, and Providing Penalties for the Violation Thereof.

The Board of Commissioners of the Borough of Beach Haven, in the County of Ocean, do Ordain:

Section 1. Short Title: This ordinance shall be known as the Borough of Beach Haven Beach Protection Ordinance.

Section 2. Findings and Declaration:

(a) It has been clearly demonstrated that well established and protected sand dunes, together with berms, beaches and underwater slopes of suitable configuration and of proper grade and height, are a durable and effective protection against high tides and flooding, and against damage by the ocean under storm conditions, and are the natural protections of the coastal areas adjacent thereto, and the State and its subdivisions and their inhabitants have an interest in the continued protection thereof, and in the right to restore them in the event of damage or destruction.

(b) Said dunes are vulnerable to erosion by both wind and water, but primarily by wind, since its attacks against the dunes are sustained for substantial and frequently recurring periods of time whereas, if protected by typical berms, beaches and underwater slopes, the dunes are attacked by water only at infrequent intervals. The best available means of protecting said dunes against wind erosion is by preventing indiscriminate trespassing, construction or other acts which might destroy or damage said dunes, and through the use of native plantings, supplemented by sand fencing and other devices designated to prevent the free blowing of sand and the maintenance of the surface tensions, root accumulations, normal contours and other features found in typical natural dunes.

(c) The immediate dune and beach area is not capable of rigid definition or delineation, or of com-

pletely firm stabilization, of that particular sites, at one time free of dunes, may, as the result of natural forces, become part of the dune area necessary for the continuation of the protection above outlined, and persons purchasing or owning such property do so subject to the public interest therein.

(d) It is a purpose of this Ordinance to define the areas so affected and to establish regulations to assure their continued effectiveness. This Ordinance is declared to be an exercise of the police power in the interest of safety and welfare and for the protection of persons and property.

(e) The erosion of the beachfront during the storm of March 6th and 7th, 1962, has created an immediate and imminent threat and danger to life of persons and property in the Borough of Beach Haven by reason of the destruction of the sand barriers which protect the Borough's oceanfront to the end that it has become necessary to the health, safety and welfare of the Borough to repair, restore, replace or construct protective barriers on both public and private property within the Borough of Beach Haven.

(f) The interference with or the depletion of the beach and sand dunes tends to permit encroachment by the sea and the conditions above recited make it imperative that the governing body regulate and control the removal of sand from the beach or dunes or any other interference with or depletion of the protective barrier on the oceanfront of the Borough of Beach Haven.

SECTION 3. DEFINITIONS:

Backshore: That zone of the shore or beach lying between the foreshore and dune area, and normally acted upon by waves only during severe storms, especially when combined with exceptionally high water.

Beach: The zone of unconsolidated material that extends landward from the low water line to the place where there is marked change in material or physiographic form, i.e. dune or bulkhead. Includes Foreshore and Backshore.

Strand: The same area included within the definition of Beach.

Beach-Dune Area: The district set off by this Ordinance, to include the dunes, beaches, strand, backshore and foreshore, and the areas where, according to a normal beach profile, the same would or should exist.

Boardwalk: This shall include the term "walkway" and shall mean a walk or promenade of planking built across the dune line or berm(s) to connect the street ends or other property with the open beach. These shall be perpendicular to the western boundary of the dune zone, and in no case shall a wooden promenade parallel to or along the beach be permitted. The height, width, length and type of construction of these must be approved by the Borough Engineer.

Dunes: A hill of sand accumulated along the beach front, usually by natural means. It shall extend from the backshore to the line where the normal leeward slope intersects the established grade of the hinterland.

Dune Area: The area actually or normally occupied by dunes. For purposes of this Ordinance it shall be construed to include its actual dimensions or according to a computed profile with a height of 14′ above mean seal level, a crest of 20′ and a leeward slope of 1.5, which ever shall be greater; but not greater than 50′ from the average seaward side of the dune crest as computed by the Borough Engineer and provided further that the leeward slope shall in no case be made steeper than 1.5.

Dune Line: This shall mean a row of dunes, which may blend in with a berm, or berms, which blend in with each other, are roughly parallel to the ocean, and serve as a protective barrier against the elements.

Foreshore: The part of the shore, lying between the crest of the seaward berm and the ordinary low water mark, that is ordinarily traversed by the uprush and backrush of the waves.

Mean Sea Level: This shall include the term "sea level" and shall refer to the 1929 Sea Level Datum

established by the U. S. Coast and Geodetic Survey, or, such other datum as may be established by the U. S. Army Corps of Engineers or other properly authorized agencies.

Natural Dune: A dune created by natural forces, or one that has developed the contours, vegetation, root systems, etc., characteristic of dunes so created.

Natural Vegetation: This shall include the terms "native vegetation" or "indigenous vegetation." Specifically it shall mean such plants as beachgrass (Ammophila breviliquata), dusty miller (Artiemisia stelleriana), hudsonia (Hudsonia tomentosa), sea rocket (Cakile endentula), seaside goldenrod (Solidago sempervirens), bayberry (Myrica Pennsylvanica), or beach plum (Prunus maritima) which normally grow, or may be planted on the slopes of dunes or behind them; no distinction is made as to how such plants are introduced into their locations.

Sand Fence: This shall include the term "snow fence" and may mean either of two types of barricade established in a line or a pattern to accumulate sand and aid in the formation of a dune.

(a) brush type—This consists of dead bushes, trees, reeds, or similar debris collected in bundles and fixed by stakes or similar means.

(b) picket type—This shall be the commercial variety of light wooden fence, held together by wire and secured by posts.

Slope, leeward: This shall be the face or surface of the due or berm going from its crest or plateau away from the ocean.

SECTION 4. A. This Ordinance shall be applicable to the beach-dune area as hereinbefore defined.

B. No construction of any sort shall be allowed in the foreshore or backshore areas thereof excepting protective works undertaken by the Borough, with the approval of the Bureau of Navigation of the State of New Jersey, and/or the U. S. Army Corps of Engineers, as applicable.

C. No construction of any sort shall be allowed in the remainder of the Beach-Dune area except the following:

1. Any use mentioned in paragraph B above.

2. Boardwalks and steps to permit access across the dunes or berms to the open beach, without damage to the dunes themselves.

3. Sand fences to encourage the accumulation of sand.

4. Pavilions or similar small platforms of less than 300 square feet in area, provided they do not have more than 40% solid walls, are mounted on suitable pilings, and the area for 20 feet around them is suitably planted with beach grass or other natural vegetation capable of stabilizing the sand in such area, provided further it shall be established to the satisfaction of the Borough Engineer that the proposed design and construction methods as applied to the particular site situation and time will not:

(a) unreasonably disturb the existing dunes.

(b) be likely to create wind currents detrimental to the existing dunes.

(c) be likely to create, increase, or prolong any other hazard.

The design and construction of any such pavilion or platform shall include any feature, device or provision required by the Borough Engineer to carry out the intent of this Ordinance.

5. A bulkhead designed to replace or supplement dunes as herein described, provided that, before any permit shall issue or be effective for the construction of any such bulkhead it shall be demonstrated by competent engineering studies and design that such bulkhead will:

(a) In every respect provide as much protection as the dunes intended to be in such area, in optimum condition, would provide.

(b) Create, increase, or prolong no condition likely to be detrimental to the maintenance of an adequate dune line.

(c) Conform adequately with the overall beach protection plans of the Borough, the Bureau of Navigation, and the U. S. Army Corps of Engineers.

The Governing Body shall conduct or require such hearings, and the production of such proofs as it shall reasonably consider necessary to establish the foregoing.

D. Access to the open beach in this zone shall be obtained only across street ends or along properly constructed and authorized boardwalks and steps. Where boardwalks and steps are constructed in street end extensions, access shall be across such boardwalks and steps only.

E. The Borough may erect or require the construction of fencing along the western limits of the backshore and dune areas and provide or require suitable markings to identify the same. Persons may enter such areas only to carry out the purposes of this Ordinance. Where walkways or boardwalks exist, the same shall be suitably bordered with fences to prevent damage to the dunes or berms which they cross.

F. The unauthorized removal or displacement of sand within the beach-dune area or the unauthorized trespassing upon the dune area shall be construed a violation of this Ordinance.

G. The unauthorized removal or destruction of natural vegetation within the dune area shall be construed a violation of this Ordinance.

H. Where by action of high winds and/or tides, sand is blown or washed upon lands lying westwardly from the dune line, such sand shall not be removed from said lands, except to be replaced upon the beach-dune area, unless a permit therefor shall have been issued pursuant to an application in writing by the owner of said lands to the Board of Commissioners. No such permit shall be issued without a determination by the Board of Commissioners, based upon an inspection of the area involved and a report thereon by the Borough Engineer, that such removal.

will not create or increase a danger or hazard to life or property.

SECTION 5. Administration and Penalties:

A. The Borough Engineer shall, by such surveys and calculations as he finds necessary, locate the beach and dune areas as defined in this Ordinance, and plot the same on a plan of the Borough, which plotting, or a copy thereof shall be on file in the Office of the Borough Clerk, and available for inspection. He shall from time to time make any corrections in his findings and plottings that changes in the natural or artificial features of the terrain may justify or require.

B. The Building Inspector is designated as the person responsible for the enforcement of this Ordinance.

C. Any person violating any of the provisions of this Ordinance shall, upon conviction, pay a fine of not exceeding Two Hundred Dollars ($200.00), or be imprisoned in the County Jail for a term not exceeding thirty (30) days, or both, for each separate offense, and each day any such violation shall continue it shall be construed a separate offense.

SECTION 6. SEPARABILITY:

If any section, paragraph, subdivision, clause or provision of this Ordinance shall be adjudged invalid, such judication shall refer and apply only to that section, paragraph, subdivision, clause or provision so adjudged, and the remainder of this Ordinance shall remain valid and effective.

SECTION 7. ALTERNATE AUTHORITY:

Should any provision of this Ordinance as applied to any specific parcel of land be adjudged by any court of competent jurisdiction to be a taking within the meaning of eminent domain, the Borough may, at its option, if the public safety, welfare or need so require, pay into court or otherwise secure the value of such land, and proceed to take title to the same

in accordance with the procedure then provided by law.

SECTION B. EFFECTIVE DATE: This Ordinance shall take effect upon its final passage and publication as provided by law.

ORDINANCE No. 63-5

An Ordinance to Amend the Ordinance Entitled "An Ordinance to Define and Delineate the Beach and Dune Areas of the Borough of Beach Haven, and Establish Regulations for the Use and Protection Thereof, and Providing Penalties for the Violation Thereof."

The Board of Commissioners of the Borough of Beach Haven, in the County of Ocean, Do Ordain:

SECTION 1. Section 4 of the Ordinance No. 63-4, the title of which is set forth in full in the title hereof, is amended as follows:

A. To substitute for Paragraph F thereof a new Paragraph F to read as follows:

"F. No individual, firm or corporation shall authorize or participate in any manner in the moving or displacement of sand within the beach-dune area unless a permit therefor shall have been issued pursuant to an application in writing to the Board of Commissioners. Said application shall contain the following information:

1. Name and address of the applicant.

2. Location of sand to be moved or displaced.

3. The nature and purpose of the proposed moving or displacement.

4. Proposed method by which the applicant desires to move or displace the sand, including a description of the equipment, machinery or other apparatus to be used.

5. Estimate in terms of cubic yards as to the quantity of sand to be moved or displaced.

6. Such other information as may be required by the Board of Commissioners.

No such permit shall be issued without a determination by the Board of Commissioners based upon an inspection of the area involved and a report thereon by the Borough Engineer that such removal will not create or increase a danger or hazard to life or property. No permit will be granted if the proposed moving or displacement will:

1. Adversely affect the littoral drift on the beach-dune area.

2. Result in a reduction of dune protection and the dune-area as defined in Section 3 of this Ordinance; and

3. Interfere with the general configuration of the beach-dune area of the subject property or neighboring properties."

B. To substitute for Paragraph G thereof a new Paragragh G to read as follows:

"G. No permit will be granted and it shall be unlawful for any individual, firm or corporation to authorize or participate in:

1. The removal of sand from the beach-dune area or from any street end.

2. The removal or destruction of natural vegetation within the beach-dune area."

C. To substitute for Paragraph H thereof a new Paragraph H to read as follows:

"H. Where by action of high winds and/or tides, sand is blown or washed upon lands, including street ends, lying westwardly from the dune line, such sand shall not be removed from said lands unless a permit therefor shall have been issued pursuant to and in full compliance with the requirements set out in Paragraph F above."

SECTION 2. This Ordinance shall take effect on its final adoption and publication as provided by law.

ORDINANCE 64-17

"An Ordinance Amending the Ordinance Entitled 'An Ordinance to Define and Delineate the Beach and Dune Areas of the Borough of Beach Haven and Establishing Regulations for the Use and Protection Thereof, and Providing Penalties for the Violation thereof.'"

The Board of Commissioners of the Borough of Beach Haven, in the County of Ocean, do Ordain:

SECTION 1. Ordinance No. 63-4, being the Borough of Beach Haven Beach Protection Ordinance, the title hereof, as previously amended, is further amended in the following respects:

A. To add to Section 3 thereof the following definitions:

Bulkhead Line and Building Line: The lines so designated on maps entitled Bulkhead and Building Line at Atlantic Ocean, Chatsworth Avenue to North Borough Line, Borough of Beach Haven, Ocean County, New Jersey, and Bulkhead and Building Line at Atlantic Ocean, Chatsworth Avenue to South Borough Line, Borough of Beach Haven, Ocean County, New Jersey, both prepared by Taylor, Wiseman, Taylor and Sleeper, Consulting Engineers, dated June, 1964, and on file in the office of the Borough Clerk.

B. To add to the definition of *Beach-Dune Area*, as defined in Section 3 thereof, the following sentence. The Beach-Dune area, as defined therein has been established by Taylor, Weisman, Taylor and Sleeper, Consulting Engineers, and constitutes all that area lying eastwardly of the Building line as hereafter defined.

C. To add to Section 4, C, 5 thereof a new subparagraph (d), providing: No bulkhead shall be constructed eastwardly of the bulkhead line as defined in Section 3 hereof.

SECTION 2. This Ordinance shall take effect on its final adoption and publication as provided by law.

E.

Statement of the Case

The Petitioners, husband and wife, are the owners of a number of building lots in the Borough of Beach Haven, in the County of Ocean. For the purposes of this case, they appear to have been originally laid out on a plan prepared by the developer which was marked as Exhibit P-1 and a re-production of which is to be found at P59a. The developer had divided his tract not only into lots but also into blocks, each of them being numbered. More recent plans of the area in which the Petitioners' lots are located, have changed the block numbers so that, as regards the evidence in this case the numbers of the blocks in which the Petitioners' lots are located have on numbering on Exhibit P-1 but on all other maps the blocks have a different numbering. The identity of the lot numbers is the same on all of the plans which were before the court below and which have been re-produced here. It is well, therefore, for us to prepare a key which the court may consider as it reads this brief and examines the documentary evidence reproduced for its consideration. That key is as follows:

Exhibit P-1 Block	Other Plans Block	Lots
49	42	1–5
50	21	1–18
		22–24
51	20	3–17
52	19	11–14

In the years from April, 1929, up to and including June, 1962, the ebb and flood of tides affected the shore line estate of the properties owned above by the Petitioners herein and have resulted in both erosion and accretion of such beach front as is reflected in Exhibit D-2.

The Petitioners claim to own all of the land to the East of their Lots 11 and 12, in Block 19, 3 to 10 in Block

20, 1 to 10 in Block 21, and 1 to 5 in Block 42 as delineated on Exhibit P-2. They do, however, recognize and concede the right of the respondent to open Beach Avenue as shown on Exhibit P-2, or such part of it as remains uncovered by the ocean at high tide, as a public street should that be practicable, and the right of the respondent therefor to have an easement over, in and along Beach Avenue solely for street purposes, if, as and when that is practicable, but subject to the basic ownership by the Petitioners of the underlying fee. They also claim to own that area of Kentford Avenue lying eastwardly of a line representing the extension across Kentford Avenue of the real lot lines of Lots 1 to 10 in Blocks 20 and 42; in the same way, the bed of Leeward Avenue lying East of the westerly line of Lot 15 in Block 21 extended across Leeward Avenue to meet the westerly line of Lot 16 in Block 20 and the bed of Merivale Avenue, East of a line drawn across Merivale Avenue extending across the westerly line of Lot 13 in Block 20 to meet the westerly line of Lot 14 in Block 19, in all cases, however, subject to the right of an easement for but limited to the use of a public street of the respondent if, as and when it would be practicable to use this area for a public street. Their claim of ownership is a combination of two legal propositions: First, that they have acquired rights by accretion and second, that they own the fee at least to the center line of public streets and have the right to use the same for all lawful purposes unless and until the municipality determines to and actually does use the area for the purposes of a public street.

But above all, in reality, the strand as it now exists is located for the most part on land to which the Petitioners have a perfectly good, undisputed paper title; and the location of Beach Avenue is such that the Borough of Beach Haven could not now possibly use it for the purposes of a street. The Petitioners have erected an apartment house on Lots 10 and 12 in Block 20 which is shown on Exhibit

P-2 as a rectangle with cross hatches marked therein. This is an income-producing property. They have also erected a dwelling house for themselves on Lots 15 and 17 in Block 21 which is shown on Exhibit P-2 as a square with cross hatch marks therein. Exhibits P-3 (P63a) and P-4 (P65a) are photographs taken in the month of August, 1963 (P41a, 2-8). Exhibit P-3 shows the Petitioners' apartment house, which is known as the Sand Castle (P41a, 9). Exhibits P-3 and P-4 show pretty clearly that such of the lots as are owned by the Petitioners bearing numbers lower than the number 11 constitute the beach or strand in front of their buildings.

The property rights of the Petitioners create no real problem on this appeal. While the Respondent has heretofore questioned the title of the Petitioners, the fact is that the Respondent has at no time ever pleaded that a superior title to that of the petitioners was in the respondent. As a matter of pleading, the petitioners alleged a taxpayers' status (P1a, 21), which was admitted by the respondent (P8a, 13). The status of the petitioners to sue was conceded at the pretrial conference (P32a, 2). The judgment in favor of the petitioners and against the respondent (P37a, 30) on the second count of the complaint (P4a) adjudicated that as between the petitioners, on the one hand, and the respondent, on the other, the petitioners had a right to possession superior to any right possessed by the respondent. The respondent paid and satisfied that judgment and no appeal has been taken therefrom. The propriety of that judgment is not before this Court. It stands as a final adjudication between the parties of their rights of possession if not of their title.

In the year 1962, the petitioners considered that some individuals and the respondent had claimed for themselves and for the public some rights in the lands eastwardly of the petitioners' holdings, which, if continued, would ripen into legal rights in positive derogation of the petitioners'

title, with the result that the petitioners caused heavy posts to be sunk into the soil enclosing at least parts of the area claimed by the petitioners and these posts appear on Exhibit P-2, except that those shown at or near the northerly side line of Kentford Avenue the petitioners do not concede were correctly placed by the draftsman. On or about June 13th, they erected a fence supported by these posts, which fence they kept up for a 24 hour period and during which time they excluded all members of the public known by them to be intending to trespass thereupon. At the end of the 24 hour period they removed the fence but left the posts still standing. The respondent sent its employees to the premises, removed the posts from the places at which the petitioners had had them sunk into the ground and placed them upon petitioners' upland.

On July 31, 1962, the respondent adopted its Ordinance No. 62-10, reproduced herein at P6a and P7a. The petitioners thereupon filed their complaint in the Law Division of the Superior Court in two counts: The first, in lieu of prerogative writ to review the validity of Ordinance No. 62-10, which the petitioners claim is unconstitutional, and second, for the recovery of damages from the respondent as in the case of trespass *quare clausum fregit* for damages in the amount of $300, that being the amount which it had cost the petitioners to sink their pilings into the earth and the value of which service had been lost to them by the unlawful action of the respondent (P1a, 5a).

On April 23, 1963, the respondent adopted another ordinance No. 63-4 and on May 28, 1963, still another ordinance, No. 63-5, amendatory of Ordinance No. 63-4. These ordinances are found at P14a and P22a respectively. The petitioners obtained leave of court to supplement their complaint and did supplement their complaint to review the constitutionality of these two ordinances (P11a-P12a).

A fifth count was included in the supplemental complaint (P12a) to review the constiutionality and validity of an ordinance, No. 64-12, but the court need not concern itself with this count or with this ordinance because it was conceded at the pretrial conference that Ordinance No. 64-12 was never adopted (P30a, 29 and P32a, 34).

Pending the hearing and decision of the civil action which has just been described and to which Docket No. L-23782-61 has been assigned (P1a, 5), and on October 17, 1964, the respondent adopted Ordinance No. 64-17 (P46a, *et seq.*), which further amended Ordinance No. 63-4. The petitioners desiring not to delay a determination of the issues in Docket No. L-23782-61 by including therein a demand for the review of Ordinance No. 64-17, started a second action in which they sought to have Ordinance No. 64-17 set aside as unconstitutional and to which Docket No. L-9886-64 P.W. was assigned (P44a). For such few references as shall hereinafter be necessary to the two suits, we will refer to them for convenience as the first and second suits.

Ordinance No. 64-17 incorporated by reference in it a plan prepared by respondent's engineers. Both Ordinance No. 64-17 and the plan which it incorporated by reference were before the court in the trial of the first suit and the plan was marked therein as Exhibit D-2 (P67a).

The Court below tried the first suit at a plenary hearing on January 11, 1965, at which time and Court indicated that there should be a judgment for $300 in favor of the petitioners and against the respondents on the second count of the complaint (P34a, 22 and P4a, 4). Insofar as the validity of the ordinances under review was concerned the Court reserved decision and rendered a letter opinion in writing on January 22, 1965 (P34a), which upheld the validity of Ordinance No. 62-10 as amended by Ordinance No. 62-14, as well as the validity of Ordinance No. 63-4 as amended by Ordinance No. 63-5.

Both parties brought on motions for summary judgment, the full proceedings of which have been reproduced in the appendix at P51a, *et seq.* The Court below held that Ordinance No. 64-17 was constitutional and appropriate judgments were entered simultaneously (P37a and P56a). The Petitioners appealed from all of the final judgment in the first case, except that portion thereof as entered a judgment in favor of the Petitioners and against the respondent in the sum of $300 on the second count (P39a); and from the whole of the final judgment entered in the second suit (P57a).

The two appeals were consolidated and heard by the Supreme Court of New Jersey, which rendered an opinion and judgment on March 21, 1966, affirming the decision of the Superior Court of New Jersey. The opinion of the Court and the judgment are appended hereto.

F.

This is a petition in which review of a judgment in a State Court is sought. The Federal questions sought to be reviewed are raised in a timely manner in a complaint filed with the Superior Court of New Jersey by the Petitioners (P3a, 28, Para. 10). The Federal questions were further raised in the supplemental complaint filed in the Superior Court (11a, 26, Para. 4; 12a, 20, Para. 4; 13a, 22, Para. 4). The Federal questions of constitutionality are embraced in the pretrial order entered by the Superior Court (30a, 10, Para. 2; 32a, 22, Para. 7). The Federal questions sought to be reviewed were further raised in a complaint filed in the companion suit (45a, 30, Para. 8; 46a, 8, Para. 2).

Questions of law, including the constitutional questions and the Federal questions, came before the Supreme Court of New Jersey and Justice Haneman recognized the fact that the Petitioners had raised the questions in the following language:

"Plaintiffs argue that the Ordinance, as applied to them constitutes a taking of their property for public purposes without just compensation. They rationalize that the regulations are so onerous that the uses to which their lands may now be put are minimal. They conclude that this barring of any real beneficial use constitutes a taking under the police power and is unconstitutional. They argue as well that the ordinances are unreasonable, vague and indefinite both in purpose and standards and hence unconstitutional.

Generally, it must be recognized that property cannot be taken for public use without compensation. N. J. Const., Art. I, par. 20, U. S. Const. Amend. XIV."

46 N. J. 489, Justice Haneman further noted:

"Here, plaintiffs assert that the ordinance is unconstitutional because if the regulations were enforced against their particularly described land they would be deprived of its use. No objection is grounded on an arbitrary or unreasonable exercise of police power because of the lack of necessity for action or erroneous means adopted to accomplish that result. They do not contest either the municipal finding that a condition exists which constitutes a present public danger or that the means set forth in the Ordinance for alleviating or remedying that condition are suitable for the accomplishment of that purpose, nor do they suggest any other effective or less burdensome means capable of counteracting the danger. Rather, the contest of the constitutionality is based solely on the impact that the regulations have upon the useability of plaintiffs' lands.

To sustain such an attack, the burden is cast upon a plaintiff to prove that the ordinance unduly burdens his beneficial use of the land. *Goldblatt* v. *Hempstead,* 369 U. S. 590, 8 L. ed. 2d 130 (1962). It follows that an essential element of plaintiff's proof is the existence of some present or potential beneficial use of which he has been deprived."

Justice Haneman upon a consideration of the record and his understanding of the applicable law, determined that the Petitioners failed to educe proof of any economic use to which the property could be used and therefore had failed to demonstrate that the ordinances in question resulted in an unconstitutional taking.

Justice Haneman further concluded that the standards furnished and provided by the terms of the ordinance were adequate and thus as they applied to the Petitioners such ordinances were not unconstitutional as being too vague and uncertain.

G.

Not applicable to this petition.

H.

Section I of the Fourteenth Amendment to the Constitution of the United States provides in part that, "nor shall any State deprive any person of life, liberty or property without due process of law, . . ."

The Petitioners herein are owners of said property located in the Borough of Beach Haven, and it is their contention that the respondent, Borough of Beach Haven, acting under its police power, and in direct response to a severe storm of March 6th and 7th, 1962, and in order to protect the beach front area of the Borough from storm and erosion damages, did pass ordinances No. 62-10, as amended by No. 62-14, and 63-4, as amended by 63-5 and 64-17, and that this action of the Borough so curtailed the enjoyment, use, possession, and ownership of the property of the petitioners herein through its application to them and its regulation of their properties, as to constitute a taking of the petitioners property without due process of law. The petitioners further contend that the Supreme Court of New Jersey, speaking through Justice Haneman, in answering the complaint of the Petitioners herein, failed

to apply the precedents and decisions under the fourteenth amendment of the United States Constitution as defined and interpreted by this Honorable Court. The decision of the Supreme Court of New Jersey, in contravention of the applicable decisions of this Court deprived the Petitioners herein of their rights as protected under the Constitution of the United States.

This Honorable Court considered the matter of how far a governmental agency may regulate or restrict the use of property without violating the constitutional mandates against taking without compensation, and in a well-reasoned opinion delivered by Justice Holmes in this Court in the case of *Pennsylvania Coal Co.* v. *Mahon,* Pa. 1922, 260 U. S. 393, 43 Sup. Ct. 158, made the following observation:

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."
>
> . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

This Court has further held in the case of *State of Washington* v. *Roberge,* Wash. 1928, 278 U. S. 116, 49 S. Ct. 50, that the right of a person to devote his land to any legitimate use is property within the protection of the constitution.

The Petitioners respectfully urge upon this Court that not only the degree of regulation and its effect upon the enjoyment and use of the property a matter to be determined, but in addition, this Court should properly have in mind the path established by this Honorable Court to determine what type of interference is sufficient to constitute a taking within the meaning of the due process clause. We would urge to this Court the precedence of the Case of *United States* v. *Causby,* Ct. Cl. 1940 Fed. 328 U. S. 256, 66 S. Ct. 1062, wherein this Court found that various air-

craft of the United States were using a military airport in such a manner as to fly over the home of the petitioner and his chicken farm, and that this manner of flying so interfered with his enjoyment of his household to deprive he and his family of sleep and cause them nervousness and fright, and further caused losses among his chickens, that this activity was such interference with his whole enjoyment of his property as to amount to exploitation of it. The Court here speaking through Justice Douglas observed,

> "We agree that in those circumstances there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the defendants never touched the surface would be as irrelevant as the absence in this day of the feudal livery of season on the transfer of real estate. *The owners right to possess and exploit the land, that is to say, his beneficial ownership of it; would be destroyed.*" (Emphasis ours).

Justice Douglas continued,

> "We have said that the air space is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining lands. The landowner owns at least as much of the space above ground as he can occupy or use in connection with the land. See. Hinman v. Pacific Air Transport, 9 Cir., 84 Fed. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of a building and the like—is not material. As we have said, the flight of air planes which skim the surface but do not touch it, is as much as an appropriation of a use of the land as a more conventional entry upon it."

See also, to the same effect, *Griggs* v. *County of Allegheny*, Pa. 1962, 369 U. S. 85, 82 S. Ct. 531.

We believe the above precedents are binding on this Court and are applicable to the instant case, as it is the contention of the Petitioner that the several Ordinances under consideration herein taken individually and together, constitute a taking of property without due process of law. Briefly, we will review the Ordinances.

Ordinance No. 62-10 as originally enacted made it a penal offense, punishable by either fine or imprisonment, for any person to erect on any privately owned beach, "east of the dune line as established by the Borough Engineer" any fence which interfered with the unobstructed use of such beach by the public or with the use thereof by any public official or public employee or contractor doing work thereon to repair or prevent storm damage, without a permit first being obtained so to do from the governing body of the Township. The Ordinance provided no standards by which the governing body was to be guided in the issuance or denial of any permit applied for. The Township did by Ordinance 62-14, pass an amendment to remove from this Ordinance the language, "which interferes with the unobstructed use of such beach by the public:", the intent and purpose of the Ordinance, however, remained the same. The purpose of this Ordinance was to compel the Petitioners to allow the public to use the land which they owned and which is a part of the ocean beach or require the Petitioners to allow the Township to use that property, and sought to prevent the Petitioners from excluding the public generally, and the respondents in particular therefrom by the use of a fence. It made no difference to the respondent that the Petitioners were trying to protect themselves from the beginning of legally sustainable hostile claims to their title by subscription or adverse possession.

Ordinance No. 63-4 is to be found at P14a, *et seq.*, and basically has several pertinent sections. Section 4 of the Ordinance is the crucial section, but before an intelligent understanding of this Section can be had, it is necessary to have at least a tentative understanding of the major terms described by the ordinance. We say "tentative" because nearly all of the definitions are so vague and indefinite that they are incapable of being understood, a circumstance which will be considered subsequently. First of all, we may understand that the words "beach" and "strand" are synonymous (P16a, 14). The area constituting them begins at the low water line and extends landward (P16a, 8). They include "Foreshore and Backshore" (16a, 11).

The foreshore begins at "the ordinary low water mark", (P17a, 14). The backshore is the zone lying between the foreshore and the dune area (P16a, 3). We can then deduce that beginning at the ordinary low water mark and working landward we first have a foreshore, followed by a zone known as the backshore, which is in trun followed by a zone known at the dune area, and that the beach or strand consists of the foreshore and backshore. The original definition of "beach-dune area" informs us that this area includes the dunes, beaches, backshore and foreshore (P16a, 16), so that this definition would enable us to conclude that the beach and the dune area includes the beach, and the dune area, or the foreshore, backshore, and dune area.

At this point an already complicated situation is further complicated by Ordinance No. 64-17, the text of which appears at P-46a, 29; and P-47a, 31. This Ordinance incorporates by reference in it a plan, which is Exhibit D-2, (P67a) which constitutes a bulkhead line and a building line. This Ordinance amends Ordinance No. 63-4 by adding to the definition of the "beach-dune area", the requirement that the beach-dune area is all of the area lying eastward of the building line (P47a, 18).

Section 4A of Ordinance No. 63-4 provides that the ordinance is applicable to the beach-dune area (P18a, 13). Section 4 B forbids any construction in the foreshore or backshore areas except protective works undertaken by the defendant (P18a, 16). Section 4 C forbids construction in the remainder of the beach-dune area except (1) protective works undertaken by the defendant, (2) boardwalks and steps across the dunes, (3) sand fences, (4) pavilions, and (5) bulkheads (P18a, 22, P19a, 18). All boardwalks are required to be perpendicular to the western boundary of the dune zone and the height, width, length and type of construction must be approved by the borough engineer (P16a, 22-30). No standards are provided for the governance of any boardwalk. The sand fences which may be built are described in the definitions of the term, "sand fence", at P17a, 38, P18a, 7, but it must be remembered that before even one of these may be built a permit must be obtained pursuant to Ordinance No. 62-10, as to which no standards are provided. Any pavilion which is built must meet the satisfaction of the borough engineer (P18a, 39), who is supposed to be governed by three vague standards (P19a, 1-7) and who, in any event, by fiat, may require the design and construction thereof to include any feature, device or provision which he may think necessary to carry out the intent of the ordinance. Before any bulkhead may be built a permit must be obtained from the governing body, and before the permit can be obtained, the applicant must have an engineering study made (P19a, 14-18).

In summary, in the foreshore and backshore area there can be only such construction as the Respondent desires to undertake and in the dune area, there can be no construction by the owner except as to four types of items as to each of which he must get official approval from the Respondent or one of its representatives before he may construct anything, and he may be required to submit to having the Respondent build such items as it desires even in that area.

Section 4 D prohibits the owner of ocean front property from crossing the dunes which he owns to get to the beach which he owns unless he does so over properly constructed and authorized boardwalks and steps, and, if boardwalks and steps are provided for him and by him in street end extensions, then he may not go over his own dunes to his own beach even by way of a boardwalk and steps.

Section 4 E of the ordinance purports to give the Respondent the right to erect fences along the westerly limits of the backshore and dune areas and to provide suitable markings to identify the same or to require the owner to do so. It also forbids all persons to enter the backshore or dune areas except to carry out the purposes of this ordinance (P20a, 2-9).

Section 4 F makes it unlawful for any person to move sand from one place to another within the beach-dune area without a permit granted by the governing body of the Respondent (P22a, 20, P23a, 17); and Section 4 G makes it unlawful to remove sand from the beach-dune area or from any street end or to remove or destroy natural vegetation within the beach-dune area (P23a, 18-28). Section 4 H of the ordinance forbids the removal of sand blown or washed upon lands or street ends, lying westwardly from the dune line, without the grant of a permit on the same terms as contained in Section 4 F.

Exhibit D-2, which is a copy of that plan referred to in Section 1 A of Ordinance 64-17, which shows the bulkhead and building lines established from Chatsworth Avenue to South Borough Line, shows that these lines as established by the ordinance, extend across and affect lands which the petitioners own in fee simple. They extend across the very heart of the petitioners' Lots 1 through 5 in Block 42, the equivalent of which on Exhibit D-2, is the southerly half of Lot 12 and all of Lots 13 and 14. The bulkhead line extends across and through Lots 1 through 10 in Block 21 and the building line extends across and through Lots 6

through 11 in Block 21, which area is shown on Exhibit D-2 as Lots 8 and 9, and they extend across and through Lots 9 through 14 in Block 20 and to the West of Lots 11 through 14, in Block 19, all of which are in the ownership of the petitioners. As a matter of fact to the extent that they pass through Lots 12 and 14 in Block 20, they encompass between them slightly more than one half of the petitioners' apartment house, the Sand Castle, which Exhibit D-2 clearly shows. The location of the building line as it appears on Exhibit D-2 makes it impossible and illegal for the petitioners to use any part of Lot 11 and most of Lot 13 in Block 20 or any part of Lots 11 through 14 in Block 19 for building purposes. The location of these lines together with the application of the second sentence in Section 4 E of the ordiance (P20a, 5) make it unlawful for the petitioners or their tenants even to enter more than one-half of the Sand Castle and to approach the same from the front thereof, it being remembered that this is not a zoning ordinance and the concept of a non-conforming use is inapplicable. As such owners, except for the ordinance, they have the usual and normal rights to possess the land which they own exclusive of all other persons, to enter upon it and occupy it both as a whole and in each and every part thereof, to build structures upon it, to dig in the soil, to move the soil from place to place within the limits of their property, and, if they desire, to remove the soil therefrom to some other place, to be free from the intrusion of their government, to work the soil and change the contours thereof as it pleases them, to cultivate the soil, if they so desire, and, if not, to have it free of vegetation and to enclose it with an appropriate fence and keep all other persons excluded therefrom, if that be their pleasure. Each and every of these rights is infringed by the ordinances under attack.

Section 4 B of Ordinance No. 63-4 forbids the petitioners to construct anything in the foreshore or backshore areas, which constitute the beach or the strand. It may well

be that the petitioners may not want to construct anything within the area, but that is not the point. The point is that this ordinance deprives them of their right to construct whatever they might want to construct in this raea. Their desire might be to pitch a tent only for a hot summer afternoon. They are forbidden to do so. They might wish to erect a bulkhead to protect their property from the inroads of the ocean. They are forbidden to do so. They might want to construct a sand dune, such as the municipality has found is desirable for the protection of property from the inroads of the ocean. They are forbidden to do so. They did want to erect a fence. They are now forbidden to do so. They did want to erect poles to outline the boundaries of that area which they claimed for themselves. They are forbidden to do so.

On the other hand, they are told by their local government that it has the right to build "protective works" in these very same areas. Their government has asserted the right to decide whether or not protection against the savagery of the sea shall be erected on the petitioners' property and to do so without the petitioners' permission, if the government so desires; but at the same time, the petitioners are forbidden to help themselves. They are by Ordinance No. 63-4 given propositions of law which American citizens are unaccustomed to expeet from their government, even at a local level. They are told that their government has the right to enter upon their property and to restore sand dunes in the event of damage or destruction (P14a, 28-31). They are told that the property which they own or which they may hereafter purchase is owned by or purchased by them subject to the public interest therein (P15a, 13-15). They are told that in the interest of the public health, safety and welfare the respondent has the right to repair, restore, replace or construct protective barriers on their privately owned property (P15a, 30-34).

When, where, and how did the respondent acquire these rights? The Court below decided that it had received no conveyance of these rights from the petitioners because the respondent was found guilty of trespassing upon the petitioners' property and required to pay damages. The respondent has paid nothing for these rights and that of course becomes the bone of contention.

In the remainder of the beach-dune area, or in the dune area, the petitioners may construct nothing except boardwalks and steps, sand fences, pavilions and bulkheads, but any one or all of these may be constructed by the petitioners only if what they do or intend to do pleases the respondent. Assuming that the petitioners could construct boardwalks and steps or sand fences or a pavilion or a bulkhead that was agreeable to the respondent insofar as those structures are concerned, their right to do so might be defeated by the right of the respondent to itself build protective works in the dune area (P18a, 26).

The right of the petitioners, their children, and their guests to walk over their property as they will, has also been taken away. They have no right of access over the dunes which they own, if any there are, or over the dune area, if any there are not, to the beach, unless they build a boardwalk and steps and even this they may not do if a boardwalk and steps are provided at street end extensions (P19a, 35).

If the petitioners do not wish to have fences upon their property, they must submit to the building thereof by the defendant who has appropriated the right also to suitably mark the same for purposes of identification. If, however, the defendant desires fences to be erected upon the property of the petitioners and if it has not the funds with which to do so, it may require the petitioners to construct the fences and to label them (P20a, 2-6). The petitioners, their children and their guests may not even enter the backshore and dune areas which they own except to carry out the fiats of

the respondent, declared in or by authority of this Ordinance (P20a, 6). If the petitioners desire to build a bulkhead they may not do so east of a bulkhead line (P47a, 26).

Neither may the petitioners in any manner move or displace sand within the beach-dune area (P22a, 20) nor any sand blown or washed upon lands west of the dune line (P23a, 33), without the permission of the Respondent. This vicious ordinance makes punishable by imprisonment the exercise by the petitioners of their ancient common law right of enfeoffment and the pleasurable pursuits of their small children in digging and building in the sand. No longer may they meet the threat of intruders and trespassers seeking to establish by prescription rights adverse to the title of the petitioners, by the erection of a fence.

All of these rights have been taken away by the ordinances under attack. So that the respondent may use the property of the petitioners for the benefit of the public, not only has not one cent been paid for these rights, but the right of the petitioners to pay the taxes on this property continues without derogation.

In the case at bar, the Ordinances under review and the respondent by the exercise of its power and authority thereunder seek to do two things which are strictly forbidden by law. *Pennsylvania Coal Co.* v. *Mahon, supra.; Griggs* v. *Allegheny Co., supra, Pumpelly* v. *Green Bay Co.*, 80 U. S. 166 (1871); *Yara Eng. Corp.* v. *City of Newark*, 132 N. J. L. 370 (S. Ct. 1945); and *Indiana Road Commission* v. *Yankowski*, 193 N. E. 2d 237 (Sup. Ct. Ind. 1963), certiorari dismissed 85 S. Ct. 493 (Sup. Ct. U. S. 1965): first Ordinance 62-10 has the effect of taking private property from the owners and giving it to someone else. This Ordinance purposes to take from the petitioners their right to exclusive enjoyment and dominion over their lands and to give so much of their rights of dominion as shall be necessary for the purpose to persons who do not own the land and wish to go there for purposes of some recreation connected with

ocean bathing. Secondly, the Ordinances under review tend to take from the petitioners valuable features of their private, proprietary ownership and to use those features for the general public good. The municipality by these ordinances attempts to transfer to itself from the petitioners rights incident to the possession and enjoyment of the petitioners' property for the purpose of building, maintaining and preserving the sand dunes thereon, to the end of protecting other substantial segments of the public of Beach Haven Borough whose lands lie further back from the sea than do the petitioners' lands from the likelihood of damage by hurricane or severe storms. The sole purpose of the ordinances is to protect the public from a non-existent, but possible condition, if the ocean should again rise to abnormal heights and inundate lands lying further form the sea than those of the petitioners. The respondents would seek to prevent such damage by building sand dunes on the property of the petitioners, require the petitioners not only to allow them to be there, but to require the petitioners to keep them and preserve them. The ordinances forbid the petitioners *to even walk upon such portions of their own land* (emphasis added), except for the purpose of protecting the dunes for the benefit of the public in general. It forbids the petitioners to fence in their property against intruders. It forbids the petitioners to use the soil of their land as the petitioners may freely desire to do. In forbids the petitioners to build structures upon their lands and in some instances, it may compel the petitioners to erect fences at places designated by the respondent and to put labels upon said fences at the direction of the respondent, all based, again, on a non-existent, but possible condition.

Each of the ordinances hereunder attacked interferes in contravention of the clear policy pronouncements of this Honorable Court, with the landowners exclusive right to the possession, use and enjoyment of his property. It is respectfully submitted that on the standards set down by this court the regulation of the property under the pro-

visions of these ordinances, taken together, is of such a nature as to clearly constitute a substantial taking within the meaning of the Fourteenth Amendment of the Constitution of the United States.

It is further respectfully submitted that the Supreme Court of the State of New Jersey, speaking through Justice Haneman, failed to appreciate the nature of the property rights protected as well as the onerous nature of the ordinances and the extent of the regulations thereunder, all of which are tantamount to the taking of the very basic property rights of the Petitioners herein without due process of law or compensation. Justice Haneman concluded that the Plaintiffs had not shown or educed proof of "any economic use to which the property could be put". The Court further held below that for the petitioners to sustain an attack on the constitutionality of the Ordinances that the burden was cast upon them to prove that the Ordinances unduly burdens their beneficial use of the land. Citing for authority *Goldblatt* v. *Hempstead*, 369 U. S. 590, 82 Sup. Ct. 987 (1962). It is respectfully submitted that the Supreme Court of New Jersey failed to properly distinguish the case *sub judice* from the *Goldblatt* case. In that case, the municipality in question had passed a police ordinance to control excavating operations within the Township. They required that such operations be fenced in provided for certain slope requirements and that no excavation could take place below the water table in the Township. These were reasonable regulations related to the health and safety of the community, and though in fact the operation of the petitioner therein was in the land excavating business and that the remaining deposits were all within the water table and that the effect of the passage of the ordinance was to severely limit any further operations by the petitioner, the Court properly noted the case did not involve the power of eminent domain or the exercise of police power in regulation to such an extent as to constitute a taking

of property, because the ordinance was reasonable on its face, and reasonably related to the health and welfare of the community at large and the mere fact that the ordinance prohibited a beneficial use to which the property had previously been devoted it did not render it unconstitutional. Here the Court considered it as a prohibition simply of the use of the property for purposes declared to be injurious to the health and welfare of the community, and properly subject to such control. The instant case, however, is clearly distinguishable. In the instant case, it is not the situation of the control of business or other economic use presently existing on the property or the control of any use by the petitioner which he had undertaken or was about to undertake which of itself would be obnoxious to a community at large. Here in the instant case the municipality, under the guise of a series of Ordinances, have acquired rights in the private property of the petitioners by way of in effect establishing and maintaining by this ordinance certain sand dunes and other protected areas, which were for the public purpose of protecting the beaches of the community and providing storm protection for the community at large. Here the Borough of Beach Haven has interfered with the peaceful possession and enjoyment of the properties by the petitioners to the extent that they may not even walk upon their own land, and have in effect made a reservation of this land for storm protection purposes of a public nature, which reservation is tantamount to the taking of property rights which can only be taken or acquired by purchase or the exercise of the power of eminent domain. Any Ordinance purporting to do so as applies to the owners of property affected thereby offends the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Pa. Coal Co.* v. *Mahon, supra*; *Griggs* v. *Allegheney Co., supra*; *Pumpelly* v. *Green Bay Co., supra*; *Grosso* v. *Board of Adjustment of Millburn*, 137 N. J. L. 630 (S. Ct. 1948).

In *Pumpelly* v. *Green Bay Co., supra,* the Court at page 171 said:

> "Where real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure so placed upon it, so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."

On the basis of the above authority, and the clear precedence of this Honorable Court, the Petitioners respectfully submit that the several ordinances of the respondent municipality as applied to their property is so restrictive and so effectively destroys and impairs the usefulness and free occupation and control of their property, as to constitute a taking, without due process of law.

The Supreme Court of New Jersey, in its decision, appended hereto, chose to divide the basic ordinances for consideration into "the fence ordinance" and "the dune ordinance", and further chose to divide and consider the arguments against the taking of property without due process, and the violations of the due process clause because the several statutes were vague and indefinite in its terms and applications, as separate and distinct legal considerations. Now, for purposes of analysis and treatment, this may be a valid procedure, however, we will respectfully urge upon this Honorable Court that to properly appreciate the true onerous nature of these ordinances and the burden they placed upon the petitioners herein and their lands, that this Court should and must consider all of the Ordinances and the scheme and design behind them as one, and further, that in considering the arguments heretofore advanced as to the taking of property and the unreasonable regulation which is tantamount to a taking of property, that they also consider this taking in light of the language, definitions and prescriptions of the ordinances and the fact that on their face they are vague and indefinite both as to the standard for governmental action that they re-

quire and as to specific conduct which they prohibit. This Court may determine, despite the clear and extensive restrictions on the use and enjoyment of this property, that notwithstanding this there is still a beneficial use to be made of the property, but we would urge upon this Court that in considering the availability of this possible relief to the petitioners, minimal and unsatisfactory as it may be, that the very arbitrary and capricious manner in which the Borough and its officials may operate in allowing such minimal uses, tends at best to make the value of the remaining use of the property on the one hand speculative, and on the other hand, illusory.

The Petitioner respectfully submits that the property owner having land under the egis of these regulatory ordinances, has no more rights of ownership or control or enjoyment over private property than he would have in many well known Socialist States where the enjoyment of property such as is permitted, is subject to the arbitrary action of the State.

Ordinance No. 62-10, as amended by Ordinance No. 62-14, makes it unlawful to erect a fence or post on any privately owned beach without a permit therefor having first been obtained from the governing body of the defendant. No standard for the issuance of a permit was provided for in the terms of this ordinance and as it is penal in nature, it is in direct violation of the Fourteenth Amendment of the Constitution of the United States, that its enforcement against Petitioner tends to deprive them of their property and liberty without due process of law. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618 (1939).

Ordinance 63-4, as amended by Ordinance 63-5, by Ordinance No. 64-17, particularly in Section 4 thereof, prohibits members of the public from doing certain acts and in a few instances requires of them certain other acts. The violations thereof are punishable by fine or imprisonment, or both. The fine or imprisonment which a citizen

may be subjected to is directly dependent upon a number of definitions appearing in Section 3 of the Ordinance, without which the ordinance is absolutely meaningless. The fact is that the definitions being considered, the ordinance is also meaningless. This is because of the fact that many of the definitions in many of the other parts of the ordinance are so vague and indefinite that the ordinance if enforced against the petitioners tends to deprive them of their property and liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. *Lanzetta* v. *N. J.*, *supra*. In the *Lanzetta* case, Justice Butler who wrote for Unanimous Supreme Court, said:

> "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State demands or forbids. The applicable rule as stated in Conley v. Gen. Const. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. ed. 322.
>
> 'That the terms of penal statutes creating a new offense must be sufficiently explicit to inform those who are subject to it that conduct on their part will render them liable to its penalty is a well recognized requirement, continent alike the ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires that the doing of an act in terms so vague that men of common intelligence may necessarily guess at its meaning and differ as to its application violates the first essential of due process of law'."

The critical area dealt with by the ordinance is the beach-dune area. The definition of this area in Section 3 (P16a, 16) is vague. It is defined in terms of the location of "a normal beach profile", and the places where "dunes, beaches, strand, backshore and foreshore would or should exist". Men of common intelligence must necessarily guess at what a "normal" beach profile is and as to the location where dunes, beaches, strand, backshore and fore-

shore "would or should exist". Both of these terms are vague and indefinite and obviously are matters of some person's opinion. The definition of the term itself therefore falls squarely within the description of vagueness which the Supreme Court of the United States has established.

The fact that the defendant supplemented this definition by the adoption of a building line on a plan (P47a, 4-24), does not eliminate the vagueness. By fiat of the borough engineer the line will be changed to meet changes in the terrain (P20a, 39) but according to the supposed standard in the verbal definition which we have just finished discussing (P20a, 35).

The definitions of "bulkhead line" and "building lines", provided by Ordinance No. 64-17 in Section 1A thereof (P47a, 7) are likewise rendered vague by Section 5A. The fact is that the location of these lines may have been changed from the location at which they appear on Exhibit D-2 even by the time this case is argued.

The definition of the "beach-dune area" is dependent in part on the definitions of "dunes", "beaches", "strand", "backshore", and "foreshore". "Strand" and "beach" are synonymous (P16a, 13). Therefore the definitions of "beach-dune area", "beach" and "backshore" are all in part dependent upon the definitions of "dunes" or "dune area", both of which are extremely vague. On one side, the term "dunes" is delineated by the "backshore" (P16a, 33), but the term "backshore" is delineated by the term, "dune area", (P16a, 4), the "area actually or normally occupied by dunes". Since each definition is dependent on the other actually nothing is defined and a vagueness exists in both terms to the extent of their mutual interdependency.

The definition of "dunes" leaves as vague the other extremity of this area, "the line where the normal leeward

slope intersects the established grade of the hinterland" (P16a, 34), even considering that the term, "leeward slope", is defined (P18a, 9) as a line that no person could fix or locate and depends upon one's concept of "normal" and "hinterland", neither of which is defined. Men of common intelligence would certainly have to guess at this one!

Both sentences comprising the definition of "dune area" are vague (P16a, 36). The first is vague because the fact is, as Section 2 of the ordinance recognizes, the sand dunes are unstable. They are built up and moved away by the forces of nature. The area "actually" occupied by dunes today may not be so occupied tomorrow. Consequently no one can say, for sure the duration that an ordinance is expected to have, where the area is that is "actually", let alone "normally", occupied by a dune. In the second sentence (P16a, 37), the use of the terms "computed profile", "mean sea level", "average seaward side of dune crest", and "as computed by the Borough Engineer", not only make the sentence vague, indefinite and unintelligible, as a definition, but show that in the last analysis the location of the "dune area" is to be left to the fiat of the borough engineer. Obviously in advance of computations by an engineer, men of common intelligence would necessarily have to guess at the meaning of these definitions and might differ as to their application.

The definition of "foreshore" leaves that term vague (P17a, 12). It is defined with respect to "the crest of the seaward berm". The word, "berm", appears several times in the ordinance, P16a, 24, P17a, 8, P17a, 12, P18a, 10 and P18a, 27, yet it is not defined.

"Beach" is a term left vague by the ordinance (P16a, 8). It is said to include both foreshore and backshore, each of which we have demonstrated is vague. It extends from the low water mark to a "dune or bulkhead". The ordinance in Section 2 takes cognizance of the fact that in

many places there are no dunes and no bulkheads (P15a, 24). The absence of such is the apparent justification for the whole scheme of the ordinance. If at a given point there is no dune or no bulkhead, men of common intelligence must necessarily guess at where they might have been or might in the future be and one such man might differ from another as to this guess.

The ordinance is vague and contradictory in another aspect, with relation to the term, "beach-dune area". The title of the ordinance is, "to define and delineate the beach and dune areas" and "establishes regulations for the use and protection thereof" (P14a, 6). Section 4A of the ordinance provides that the ordinance is applicable to the beach-dune area as defined therein (P18a, 13). Section 1B of Ordinance No. 64-17 supplements the definition of "beach-dune area" in Section 3 of Ordinance No. 63-4, by providing that it constitutes, "all that area lying eastwardly of the building line" (P47a, 20). Yet Section 4H as amended by Ordinance No. 63-5 regulates the removal of sand from beach lands lying westwardly from the dune line (P23a, 33). While "dune line" has, itself, been vaguely defined (P17a), the regulation of Section 4H could extend to the westerly line of the borough. Since Section 4H purports to regulate the removal of sand within the entire "beach-dune area" (P22a, 20), it becomes very clear that the area regulated by Section 4H could extend to the westerly limits of the borough. All of this tends to place in confusion the location of the "beach-dune area", especially as the same appears in the title of Ordinance No. 63-4 (P14a, 7).

The term, "mean sea level" is on its face legally vague judged by the standard enunicated by Mr. Justice Butler, *supra*. It calls upon men of common intelligence to know or learn the 1929 Sea Level Datum established by the U. S. Coast and Geodetic Survey and requires them to guess both as to what other datum may be established by the U. S. Army Corps of Engineers or other properly author-

ized agencies and as to what other properly authorized agencies are referred to in the definition. As has been previously mentioned, in considering the true onerous burden of these regulatory ordinances on the property owner, we must consider Ordinance No. 63-4 and the only relief granted by way of structures or buildings under its provisions. This ordinance provides that the only structures which a property owner may erect within the beach-dune area are: (1) boardwalks and steps, (2) sand fences, (3) pavillons and (4) bulkheads, and that in the case of each one of these four types of structures, some form of governmental approval is first required. Thus, if the Petitioners are to have any use of this large area of land under the so-called beach-dune area, it is limited to these four uses, which itself is subject to governmental approval. Thus, once again this demonstrates the true extent of the taking of property hereunder. To add to the burdens here it is the contention of the petitioners that even this relief is arbitrary and capricious by virtue of the indefinite nature and the failure to establish standards for the granting of governmental permission to construct such structures.

The qualification on the right to erect a boardwalk and steps is found in the definition of the word, "boardwalk", in Section 3 of the Ordinance (P16a, 28). The height, length, and type of construction of boardwalk and steps must, according to the Ordinance, be approved by the Borough Engineer. The governing body has attempted to delegate this non-delegable power to the borough engineer and has not prescribed for him any standards by which he is to be governed in withholding or granting the permission for construction of boardwalks.

"Sand" fences are permitted within the dune area by Section 4C of the Ordinance (P18a, 30). The term, "sand fence" has been defined in Section 3 of the Ordinance (P17a, 38), but despite the description of the type of fences, which description does not regulate the size or height

thereof in express terms, the property owner must obtain a permit under Ordinance No. 62-10 to avoid the penalties of that ordinance and as pointed out above, this ordinance is defective in establishing any standards to avoid capricious and arbitrary governmental action.

Section 4C of the Ordinance (P18a, 33) which does permit erection in the dune area of pavillons and which does provide certain mandatory features which must be incorporated in their structure, makes the right to construct them contingent upon the approval of the borough engineer once again. Sub-Paragraph A, B, and C, and an unnumbered paragraph following them (P19a, 3-12), purports to constitute the standards by which the borough engineer is to be governed in granting or withholding his approval for the erection of a pavillon. First, he must find that the erection of a pavilion will not "unreasonably disturb the existing dunes". That is so vague and uncertain as to be no standard at all. Whether the disturbance would be reasonable or unreasonable if in fact it could be determined at all by the above engineer, is a standard left undetermined and whether the reference to "the existing dunes" refers to dunes existing on the property of the person wishing to erect the pavilion or on other property is not made clear. The second determination which the borough engineer must make is that the erection of the pavilion will not be likely to create wind currents detrimental to the existing dunes. The municipality has already provided certain standards of construction of pavilions, and just how the superior knowledge of the Borough Engineer could go beyond these standards, and enable him to determine what wind currents would be created and whether they would be detrimental or not are matters enshrouded in mystery. Thirdly, he must determine that the pavilion to be built is not likely to create, increase or prolong any other hazards. Notwithstanding the requirements of construction contained in the ordinance, the borough engineer may by fiat require the inclusion therein of any feature, device or provision which he, in

his own discretion, deems necessary to carry out the intent of the Ordinance. There is, therefore, a complete lack of standard of any reasonable nature by which the discretion of the borough engineer is to be delineated or delimited.

Before any bulkhead may be built, a permit must be obtained from the governing body of the defendant, and before the permit can be obtained, "competent engineering studies" have to be made and a design prepared which demonstrate (a) that the planned bulkhead will in every respect provide as much protection as the dunes intended to be in such area, in optimum condition, would provide; (b) create, increase or prolong no condition likely to be detrimental to the maintenance of an adequate dune line and (c) conform adequately with the overall beach protection plans of the defendant, the Bureau of Navigation, and the U. S. Army Corps of Engineers (P19a, 14-28). In no event, may a bulkhead be constructed eastwardly of the bulkhead line (P47a, 26). Obviously no one knows or can determine how much protection dunes which do not exist but which the defendant would like to exist in a given area, in optimum condition, against severe ocean storms and hurricanes. No one can determine what would create, increase or prolong a condition likely to be detrimental to the maintenance of an adequate dune line. These purported standards are so artificial that they are in effect only matters behind which the defendant may conceal itself in rendering whimsical and arbitrary decisions on applications for permits to build bulkheads. As to adequate conformity with overall beach protection plans of Army Corps of Engineers, it only need be pointed out that here very clearly the respondent is attempting further to delegate that legislative power which it assumes was delegated to it by the Legislature, to the Bureau of Navigation and to the U. S. Army Corps of Engineers. The legislative power which resides fundamentally by the Constitution of New Jersey in the Legislature of the State of New Jersey, cannot be delegated by the delegatee to another agency of the State

of New Jersey or to an agency of the United States. Furthermore, a property owner desiring to erect a bulkhead is charged with the knowledge or the duty or learning "the overall beach protection plans", of the respondent, a state agency and a federal agency. What "overall beach protection plans" are is a matter of conjecture, is a matter which may vary from time to time, and which therefore forms no definable standards by which the governing body of the defendant can be guided in the grant or denial of a permit.

Section 5 A of Ordinance No. 63-4 further delegates to the borough engineer the legislative power to amend and supplement that ordinance, as amended by Ordinance No. 64-17, insofar as the location of the beach and dune areas are concerned. In so doing, the borough engineer is to be governed "by such surveys and calculations as he finds necessary" (P20a 34). If he finds no surveys or calculations to be necessary, he may nevertheless locate the beach and dune areas where he believes they ought to be, for there is nothing in the ordinance to restrain him in any way.

In conclusion, the substantial federal question concerning the constitutional rights of the petitioners herein have been presented in that their land has been confiscated and taken for public purposes without compensation or due process of law and finally, because Ordinances No. 63-4 standing alone or as amended by Ordinances No. 63-5, or Ordinance No. 64-17, or both, are riddled with vagueness. They were drawn sufficiently vague to be elastic enough to be made to mean what the respondent municipality wants them to mean in a particular situation. They therefore violate the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and each and all of them should be stricken down in their entireties. We point to the standard of vagueness established in the *Lanzetta* case and urge that all of these matters fall within the interdiction of that standard.

In substance, the regularity ordinances of the respondent are burdensome and so interfere with the peaceful possession, enjoyment, and beneficial use of the property of the petitioners as to be confiscatory and constitute a taking, and further, the minimal use of the property retained or permitted to the petitioners under the terms of said Ordinances are in their entirety subject to the arbitrary and capricious actions of the municipality in granting its permission or allowing such uses.

Respectfully submitted,

POWELL AND DAVIS,
Attorneys for the Petitioners,

By James M. Davis, Jr.
JAMES M. DAVIS, JR.,
A Member of the Firm.

APPENDIX

Opinion

Argued November 9, 1965—Decided

MR. JAMES M. DAVIS, JR., argued the cause for Plaintiffs-Appellants.

MR. FRANKLIN H. BERRY, JR., argued the cause of Defendant-Respondent (FRANKLIN H. BERRY JR., of counsel).

MESSRS. BERRY, WHITSON & BERRY, attorneys.

The opinion of the Court was delivered by HANEMAN, J.

Judgments were entered in the Superior Court, Law Division, in two separate cases, holding, *inter alia*, that two ordinances as amended (which, for convenience, we shall hereafter refer to as (1) "fence ordinance" and (2) "dune ordinance") and adopted by defendant were constitutional. The separate appeals, limited to the constitutional issues, which were taken to the Appellate Division, were consolidated. Before argument in the Appellate Division, this Court certified the appeals on its own motion, *R. R.* 1:10-1.

Plaintiffs are the owners of 4 ocean front tracts of land in the Borough of Beach Haven. The tracts are subdivided into building lots. The first tract is bounded on the northerly and southerly sides by Jefferis and Kentford Avenues respectively and is unimproved. The second tract is bounded by Kentford and Leeward Avenues and upon this tract plaintiffs have erected a residence. The third tract is bounded on the north by Leeward Avenue and on the south by Merivale Avenue. Upon this tract plaintiffs have erected a small two-story frame apartment house. The fourth tract is bounded by Merivale and Nelson Avenue and is unimproved.

On June 13, 1962 plaintiffs erected fences extending oceanward across the beach. On June 18, 1962 defendant

razed the fences, leaving the posts lying on the beach. On July 31, 1962 defendant adopted Ordinance No. 62-10 (fence ordinance) which as amended by Ordinance No. 62-14, provides in pertinent part:

> "SECTION 1. Hereafter it shall be unlawful for any person, firm or corporation to erect, to cause to be erected or to maintain on any privately owned beach in the Borough of Beach Haven, east of the dune line as established by the Borough's engineers, any fence, wall, post, piling, stake, or structures of any sort or which will in any way interfere with or impede any public official, public employee or contractor employed by any public body in the performance of work on any such beach to repair or prevent storm damage, without first obtaining a permit therefor from the Board of Commissioners of the Borough of Beach Haven.
>
> SECTION 2. The permit referred to in Section 1 hereof shall be issued only after public hearing at a regular meeting of said governing body held at least seven days after publication of notice of such hearing in the Beach Haven Times."

Plaintiffs filed suit seeking recovery of damages for the demolition of the fence and challenging the constitutionality of the fence ordinance. Judgment was entered after trial, awarding plaintiffs $300 damages for the fence removal and upholding the constitutionality of the fence ordinance.

At the oral argument before this Court, defendant admitted that plaintiffs had a right under the several ordinances to a permit to erect a fence on their lands from the mean high water mark landward, subject however, to the condition that the fence be not so designed as to impede or prevent beach protection work, including the passage of vehicles for such purposes. So construed, we conclude that the provision is a lawful and reasonable exercise of police power for the protection of public health and safety. This is especially so in light of *N. J. R. S.* 40:92-9 which grants

the governing body power to protect its ocean and beach front. *Cf. United States* v. *Caltex, Inc.*, 344 *U. S.* 149, 97 *L. ed* 157 (1952); *Rohrs* v. *Zabriski*, 102 *N. J. L.* 473 (Sup. Ct. 1926); *Caldwell* v. *Saul*, 5 *N. J. Misc.* 165, 135 *A.* 691 (Sup. Ct. 1927); *Myers* v. *State*, 4 *N. J. Misc.* 251, 132, *A.* 335 (Sup. Ct. 1926); *Manning* v. *Hague*, 3 *N. J. Misc.* 329, 128 *A.* 375 (Sup. Ct. 1925); Annotation "Zoning regulation prohibiting or limiting fences, hedges or the like", 66 *A. L. R.* 2d 1294 (1959). No cross-appeal is taken from the judgment of $300.

The fence ordinance thus disposed of, we come to consideration of the dune ordinance which constitutes the balance of this appeal.

On April 23, 1963 defendant adopted Ordinance No. 63-4 (dune ordinance) which was amended by Ordinance No. 63-5 and Ordinance 64-17. By amendment of the above referred to fence ordinance complaint, plaintiffs also challenged the constitutionality of the dune ordinance. The court below upheld its constitutionality. Summary judgment was also entered against plaintiffs in a separate suit challenging the constitutionality of Ordinance No. 64-17 which amended the dune ordinance.

The amended ordinance reads as far as here material:

ORDINANCE No. 63-4

An Ordinance to Define and Delineate the Beach and Dune Areas of the Borough of Beach Haven, and Establish Regulations for the Use and Protection Thereof, and Providing Penalties for the Violation Thereof.

The Board of Commissioners of the Borough of Beach Haven, in the County of Ocean, do Ordain:

SECTION 1. SHORT TITLE: This ordinance shall be known as the Borough of Beach Haven Beach Protection Ordinance.

Opinion

SECTION 2. FINDINGS AND DECLARATIONS:

(a) It has been clearly demonstrated that well established and protected sand dunes, together with berms, beaches and underwater slopes of suitable configuration and of proper grade and height, are a durable and effective protection against high tides and flooding, and against damage by the ocean under storm conditions, and are the natural protections of the coastal areas adjacent thereto, and the State and its subdivisions and their inhabitants have an interest in the continued protection thereof, and in the right to restore them in the event of damage or destruction.

(b) Said dunes are vulnerable to erosion by both wind and water, but primarily by wind, since its attacks against the dunes are sustained for substantial and frequently recurring periods of time whereas, if protected by typical berms, beaches and underwater slopes, the dunes are attacked by water only at infrequent intervals. The best available means of protecting said dunes against wind erosion is by preventing indiscriminate trespassing, construction or other acts which might destroy or damage said dunes, and through the use of native plantings, supplemented by sand fencing and other devices designated to prevent the free blowing of sand and the maintenance of the surface tensions, root accumulations, normal contours and other features found in typical natural dunes.

(c) The immediate dune and beach area is not capable of rigid definition or delineation, or of completely firm stabilization, so that particular sites, at one time free of dunes, may, as a result of natural forces, become part of the dune area necessary for the continuation of the protection above outlined, and persons purchasing or owning such property do so subject to the public interests therein.

(d) It is the purpose of this Ordinance to define the areas so affected and to establish regulations to assure their continued effectiveness. This Ordinance

is declared to be an exercise of the police power in the interest of safety and welfare and for the protection of persons and property.

(e) The erosion of the beachfront during the storm of March 6th and 7th, 1962, has created an immediate and imminent threat and danger to life of persons and property in the Borough of Beach Haven by reason of the destruction of sand barriers which protect the Borough's oceanfront to the end that it has become necessary to the health, safety and welfare of the Borough to repair, restore, replace or construct protective barriers on both public and private property within the Borough of Beach Haven.

(f) The interference with or the depletion of the beach and sand dunes tends to permit encroachment by the sea and the conditions above recited make it imperative that the governing body regulate and control the removal of sand from the beach or dunes or any other interference with or depletion of the protective barrier on the oceanfront of the Borough of Beach Haven.

SECTION 3. DEFINITIONS:

Backshore: That zone of the shore or beach lying between the foreshore and dune area, and normally acted upon by waves only during severe storms, especially when combined with exceptionally high water.

Beach: The zone of unconsolidated material that extends landward from the low water line to the place where there is marked change in the material of physiographic form, i.e. dune or bulkhead. Includes Foreshore and Backshore.

Strand: The same area included within the definition of Beach.

Beach-Dune Area: The district set off by this Ordinance, to include the dunes, beaches, strand, backshore, and foreshore, and the areas where, ac-

cording to a normal beach profile, the same would or should exist. The Beach-Dune area, as defined therein has been established by Taylor, Wiseman, Taylor and Sleeper, Consulting Engineers, and constitutes all that area lying eastwardly of the Building Line as hereafter defined.

Boardwalk: This shall include the term "walkway" and shall mean a walk or promenade of planking built across the dune line of berm(s) to connect the street ends or other property with the open beach. These shall be perpendicular to the western boundary of the dune zone, and in no case shall a wooden promenade parallel to or along the beach be permitted. The height, width, length and type of construction of these must be approved by the Borough Engineer.

Dunes: A hill of sand accumulated along the beach front, usually by natural means. It shall extend from the backshore to the line where the normal leeward slope intersects the established grade of the hinterland.

Dune Area: The area actually or normally occupied by dunes. For purposes of this Ordinance it shall be construed to include its actual dimensions or according to a computed profile with a height of 14′ above mean sea level, a crest of 20′ and a leeward slope of 1.5, whichever shall be greater, but not greater than 50′ from the average seaward side of the dune crest as computed by the Borough Engineer and provided further that the leeward slope shall in no case be made steeper than 1.5.

Dune Line: This shall mean a row of dunes, which may blend in with a berm, or berms, which blend in with each other, are roughly parallel to the ocean, and serve as a protective barrier against the elements.

Foreshore: The part of the shore, lying between the crest of the seaward berm and the ordinary low water mark, that is ordinarily traversed by the uprush and backrush of the waves.

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Mean Sea Level: This shall include the term "sea level" and shall refer to the 1929 Sea Level Datum established by the U. S. Coast and Geodetic Survey, or, such other datum as may be established by the U. S. Army Corps of Engineers or other properly authorized agencies.

Natural Dune: A dune created by natural forces, or one that has developed the contours, vegetation, root systems, etc., characteristic of dunes so created.

Natural Vegetation: This shall include the terms "native vegetation" or "indigenous vegetation". Specifically it shall mean such plants as beach-grass (Ammophila breviligulata), dusty miller (Artiemisia stelleriana), hudsonia (Hudsonia tomentosa), sea rocket (Cakile endentula), seaside goldenrod (Solidago sempervirens), bayberry (Myrica Pennsylvanica), or beach plum (Prunus Maritima) which normally grow, or may be planted on the slopes of dunes or behind them; no distinction is made as to how such plants are introduced into their locations.

Sand Fence: This shall include the term "snow fence" and may mean either of two types of barricade established in a line or a pattern to accumulate sand and aid in the formation of a dune.

(a) Brush type—This consists of dead bushes, trees, reeds or similar debris collected in bundles and fixed by stakes or similar means.

(b) picket type—This shall be the commercial variety of light wooden fence, held together by wire and secured by posts.

Slope, leeward: This shall be the face or surface of the dune or berm going from its crest or plateau away from the ocean.

Bulkhead Line and Building Line: The lines so designated on maps entitled Bulkhead and Building Line at Atlantic Ocean, Chatsworth Avenue to North Borough Line, Borough of Beach Haven, Ocean County, New Jersey, and Bulkhead and Building

Line at Atlantic Ocean, Chatsworth Avenue to South Borough Line, Borough of Beach Haven, Ocean County, New Jersey, both prepared by Taylor, Wiseman, Taylor and Sleeper, Consulting Engineers, dated June 1964 and on file in the office of the Borough Clerk.

SECTION 4: A. This Ordinance shall be applicable to the beach-dune area as hereinbefore defined.

B. No construction of any sort shall be allowed in the foreshore or backshore areas thereof excepting protective works undertaken by the Borough with the approval of the Bureau of Navigation of the State of New Jersey and/or the U. S. Army Corps of Engineers, as applicable.

C. No construction of any sort shall be allowed in the remainder of the Beach-Dune Area except the following:

1. Any use mentioned in paragraph B above.

2. Boardwalks and steps to permit access across the dunes or berms to the open beach, without damage to the dunes themselves.

3. Sand fences to encourage the accumulation of sand.

4. Pavilions or similar small platforms of less than 300 square feet in area, provided they do not have more than 40% solid walls, are mounted on suitable pilings, and the area for 20 feet around them is suitably planted with beach grass or other natural vegetation capable of stabilizing the sand in such area, provided further it shall be established to the satisfaction of the Borough Engineer that the proposed design and construction methods as applied to the particular site situation and time will not:

(a) unreasonably disturb the existing dunes.

(b) be likely to create wind currents detrimental to the existing dunes.

(c) be likely to create, increase, or prolong any other hazard.

The design and construction of any such pavilion or platform shall include any feature, device or provision required by the Borough Engineer to carry out the intent of this Ordinance.

5. A bulkhead designed to replace or supplement dunes as herein described, provided that, before any permit shall issue or be effective for the construction of any such bulkhead it shall be demonstrated by competent engineering studies and design that such bulkhead will:

(a) In every respect provide as much protection as the dunes intended to be in such area, in optimum condition, would provide.

(b) Create, increase, or prolong no condition likely to be detrimental to the maintenance of an adequate dune line.

(c) Conform adequately with the overall beach protection plans of the Borough, the Bureau of Navigation, and the U. S. Army Corps of Engineers.

(d) No bulkhead shall be constructed eastwardly of the bulkhead line as defined in Section 3 hereof.

The Governing Body shall conduct or require such hearings, and the production of such proofs as it shall reasonably consider necessary to establish the foregoing.

D. Access to the open beach in this zone shall be obtained only across street ends or along properly constructed and authorized boardwalks and steps. Where boardwalks and steps are constructed in street end extensions, access shall be across such boardwalks and steps only.

E. The Borough may erect or require the construction of fencing along the western limits of the backshore and dune areas and provide or require suitable markings to identify the same. Persons may

enter such areas only to carry out the purposes of this Ordinance. Where walkways or boardwalks exist, the same shall be suitably boarded with fences to prevent damage to the dunes or berms which they cross.

F. No individual, firm or corporation shall authorize or participate in any manner in the moving or displacement of sand within the beach-dune area unless a permit therefor shall have been issued pursuant to an application in writing to the Board of Commissioners. Said application shall contain the following information:

1. Name and address of the applicant.

2. Location of sand to be moved or displaced.

3. The nature and purpose of the proposed moving or displacement.

4. Proposed method by which the applicant desires to move or displace the same, including a description of the equipment, machinery or other apparatus to be used.

5. Estimate in terms of cubic yards as to the quantity of sand to be moved or displaced.

6. Such other information as may be required by the Board of Commissioners.

No such permit shall be issued without a determination by the Board of Commissioners based upon an inspection of the area involved and a report thereon by the Borough Engineer that such removal will not create or increase a danger or hazard to life or property. No permit will be granted if the proposed moving or displacement will:

1. Adversely affect the littoral drift on the beach-dune area.

2. Result in a reduction of dune protection and the dune-area as defined in Section 3 of this Ordinance; and

3. Interfere with the general configuration of the beach-dune area of the subject property or neighboring properties.

G. No permit will be granted and it shall be unlawful for any individual, firm or corporation to authorize or participate in:

1. The removal of sand from the beach-dune area or from any street end.

2. The removal or destruction of natural vegetation within the beach-dune area.

H. Where by the action of high winds and/or tides, sand is blown or washed upon the lands, including street ends, lying westwardly from the dune line, such sand shall not be removed from said lands unless a permit therefor shall have been issued pursuant to and in full compliance with the requirements set out in Paragraph F above.

Under the amended dune ordinance there is created a Foreshore Area encompassing the lands between the mean low and high water lines. Landward of the Foreshore lies a Backshore Area which extends from the mean high water line to a Bulkhead Line. The Bulkhead Line was established by and is shown on a map prepared by Wiseman, Taylor and Sleeper, consulting engineers, which map is incorporated into the ordinance by reference. Landward and 20 feet distant from the Bulkhead Line lies a Building Line also established by said engineers and shown on said map. The stretch of land lying between the Bulkhead and Building Lines is designated as a Dune Area.

From the mean low water line to the Building Line, no construction is permitted except for fences, sand fences, boardwalks and steps to permit access to the beach over the Dune Area, pavilions or similar small platforms of less than 300 square feet, and bulkheads. Plaintiffs' first tract is almost entirely oceanward of the Building Line. Although the second tract lies on both sides of the Build-

ing Line the residence constructed on said tract lies wholly landward. The Building Line cuts through the third tract in such a way as to diagonally bisect the apartment house from its southeast to its northwest corner. The fourth tract of land is completely oceanward of the Building Line. In brief, plaintiffs own property on both sides of the Building Line.

Plaintiffs argue that the ordinance, as applied to them, constitute a taking of their property for public purposes without just compensation. They rationalize that the regulations are so onerous that the uses to which their lands may now be put are minimal. They conclude that this barring of any real beneficial use constitutes a taking under the police power and is unconstitutional. They argue as well that the ordinance is unreasonable, vague and indefinite both in purpose and standards and hence unconstitutional.

Generally, it must be recognized that private property cannot be taken for public use without compensation. *N. J. Const., Art. I, Par. 20—U. S. Const. Amend. XIV.*

Ordinarily the question arises in eminent domain cases where the property has been taken directly. However, the right to compensation has been held as viable where the property has been indirectly taken through excessive regulation under the police power.

In *Morris County Land, etc.* v. *Parsippany Troy Hills Tp.*, 40 N. J. 539 (1963), Mr. Justice Hall said, at p. 554:

> "The measures here adopted to accomplish public benefits do not amount to a direct or outright taking, as were those struck down in *Grosso* v. *Board of Adjustment of Milburn Township*, 137 N.J.L. 630 (Sup. Ct. 1948), where use of the Plaintiff's property was precluded by placing the lot in the bed of a proposed street on the official map; in *Hager* v. *Louisville & Jefferson County Planning & Zoning Commission*, 261 S. W. 2d 619 (Ky. Ct. App. 1953) where the plaintiff's land was rendered useless by

zoning it as ponding areas for temporary storage basins in accordance with a flood control plant; and in *Miller* v. *City of Beaver Falls,* 368 Pa. 189, 82 A. 2d 341 (Sup. Ct. 1951), where private utilization of the tract was inhibited for a period of years, pursuant to a statute, by its inclusion in a territory encompassed by an ordinance adopting a general plan for present and future parks.

But a taking may as well occur indirectly through excessive regulation under the police power. Thus, in Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370 (Sup. Ct. 1945) a so-called airport zoning ordinance which restricted the height of structures within designated distances of an airport and otherwise regulated use of such property so as not to endanger or interfere with the landing or takeoff of aircraft, was held unconstitutional as amounting to an appropriation of rights in private property which could only be acquired by eminent domain. And in Joint Meeting of the City of Plainfield v. Borough of Middlesex, 69 N. J. Super. 136 (law div. 1961), defendant zoned plaintiff's property exclusively for school, park and playground use as a method of depreciating its value for purposes of municipal purchase. The zoning was held invalid as unconstitutionally depriving the owner of the full value of its property. The universal truth of the pithy observation of Mr. Justice Holmes, in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922) must not be disregarded.

'The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change'."

The problem of how far a governmental agency may restrict the use of lands without breaching the constitu-

tional mandates against taking without compensation is a most confused and troublesome one. It is unclear from the cases when the economic loss suffered by a private citizen ceases to be regarded as a mere incident of the lawful exercise of police power and becomes an unconstitutional deprivation of property. No plain and catholic formula exists to ascertain the outside limits to which a regulation upon the use of land under the police power without compensation may extend. *United States* v. *Caltex, Inc.*, 344 U. S. 149, 156, 97 L. ed. 157, 163 (1952); *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594, 8 L. ed. 2d 130 (1962); Sax, "Taking and the Police Power", 74 *Yale L. J.* 36 (1964); Dunham, "Griggs v. Allegheny County in Perspective; Thirty Years of Supreme Court Expropriation Law", 1962 Supreme Court Review 63.

We, however, do not reach this problem in the case *sub judice*.

Here, plaintiffs assert that the ordinance is unconstitutional because if the regulations were enforced against their particularly described land they would be deprived of its use. No objection is grounded on an arbitrary or unreasonable exercise of police power because of the lack of necessity for action or erroneous means adopted to accomplish that result. They do not contest either the municipal finding that a condition exists which constitutes a present public danger or that the means set forth in the ordinance for alleviating or remedying that condition are suitable for the accomplishment of that purpose, nor do they suggest any other effective or less burdensome means capable of counteracting the danger. Rather, the contest of the constitutionality is based solely on the impact that the regulations have upon the useability of plaintiffs' lands.

To sustain such an attack, the burden is cast upon a plaintiff to prove that the ordinance unduly burdens his beneficial use of the land. *Goldblatt* v. *Hempstead*, 369 *U. S.* 590, 8 L. ed. 2d 130 (1962). It follows that an essen-

tial element of plaintiff's proof is the existence of some present or potential beneficial use of which he has been deprived.

Plaintiffs failed to adduce proof of any economic use to which the property could be put. The Borough, on the other hand, adduced unrebutted proof that it would be unsafe to construct houses oceanward of the building line (apparently the only use to which lands similarly located in defendant municipality have been put), because of the possibility that they would be destroyed during a severe storm—a result which occurred during the storm of March 1962. Additionally, defendant submitted proof that there was great peril to life and health arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the proscribed area in an ordinary storm. The gist of this testimony was that such regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands. Consequently we find that plaintiffs did not sustain the burden of proving that the ordinance resulted in a taking of any beneficial economic use of their lands.

Plaintiffs additionally argue that the denial of the right of promiscuous pedestrians crossing of the dunes and the obligation to construct boardwalks or steps for access to the beach is an unlawful taking. The answer to that contention is that the restriction is sustained by the proof as necessary to maintain a dune line and the curtailment of plaintiffs use of their land in that respect is also *de minimis*, and must be suffered, in the interest of public good. *Fred* v. *Mayor and Council, Old Tappen Borough*, 10 *N. J.* 515 (1952).

Plaintiffs also assert that the ordinance prevents the use of so much of their apartment house as lies within the Dune Area. The ordinance was not intended to nor does

it apply to the use and occupancy of buildings existing on its effective date and lying within the dune area. It is prospective only and relates to construction thereafter undertaken.

Plaintiffs have failed to demonstrate that the ordinances result in a taking and hence are unconstitutional.[1]

We come to plaintiffs final argument that the ordinances are unreasonable and void because they are indefinite both in standards and purposes.

They point first to the definitions as not setting forth tests with mathematical certainty. Plaintiffs seem to object to the ordinance because the various zones are not described by metes and bounds. The very nature of the subject matter of the definitions prevents more specific language than that employed. The shifting and unstable high water line and Dune Area are not susceptible of more particular description. The definitions are sufficiently clear and definite to furnish adequate information as to what was intended and to act as a restraint against arbitrary enforcement.

The standards furnished by the ordinance for the guidance of the borough engineer in passing upon an application for leave to erect one of the permitted types of construction which plaintiffs secondly argue are vague and uncertain, although in general terms, are also as precise as the situation permits. The ordinances furnish an ade-

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[1] We have not mentioned *Lorio* v. *Sea Isle City*, 88 *N. J. Super.* 506 (Law Div. 1965) where a trial court held there was a taking requiring condemnation by reason of governmental construction of a protective sand dune on the plaintiffs' property. Beyond the conclusory statement that the dune denied all use of the land, no facts are given in the opinion as to the nature of or location of the property, the extent of the dune thereon or what beneficial use the property was or could be put to previously which is now prevented. We therefore express no view on the result there reached or the relation of the decision to what we have said in the instant case.

quate standard against which to measure official action and to prevent the exercise of unbridled and arbitrary power in the enforcement thereof by the municipal government. See *Ward* v. *Scott*, 11 *N. J.* 117, 123 (1952); *Bechler* v. *Parsekian*, 36 *N. J.* 242, 255 (1961); *Switz* v. *Kingsley*, 37 *N. J.* 566, 581 (1962).

Affirmed without prejudice, however, to any further proceedings based upon a claim and showing of an actual taking of a beneficial use.

Mandate on Affirmance

(Filed 3/21/66)

This cause having been duly argued before this Court by Mr. James Mercer Davis, Jr., counsel for the appellant and Mr. Franklin H. Berry, Jr., counsel for the respondent, and the Court having considered the same.

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division, is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court, Law Division, to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 21st day of March, 1966.

JOHN H. GILDEA /s/
Clerk
Clerk of the Supreme Court

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Supreme Court of the United States

October Term, 1965

No. 258

ROBERT D. SPIEGLE and DORIS LORRAINE SPIEGLE, his wife,

Petitioners,

against

BOROUGH OF BEACH HAVEN, in the County of Ocean, a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FRANKLIN H. BERRY,
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34 Washington Street,
Toms River, New Jersey.

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ROBERT D. SPIEGLE and DORIS LORRAINE SPIEGLE, his wife,
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BOROUGH OF BEACH HAVEN, in the County of Ocean, a municipal corporation,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

A

Stated in Petitioners' Petition

B

Stated in Petitioners' Petition

C

Stated in Petitioners' Petition

D

Stated in Petitioners' Petition

E

Statement of the Case

This case involves a consolidation of two suits between the same parties wherein the Petitioners sought to have five ordinances of the Respondent Borough declared unconstitutional and void. The text of these ordinances appears in full on pages three through fourteen of Petitioners' brief. Petitioners also sought the sum of $300 as damages for the removal of certain piling by the Respondent.

The trial court upheld the validity of the ordinances in question as a valid exercise of Respondent's police power, emphasizing the importance in a seashore community of actions designed to preserve and protect the beach front. The sum of $300 was awarded to Petitioners.

The Petitioners' appeals were consolidated and heard by the Supreme Court of New Jersey upon its own motion. The opinion is reprinted in its entirety at pages 1a through 17a of Petitioners' brief wherein the Court unanimously affirmed the decision of the Superior Court of New Jersey.

The Borough of Beach Haven, Respondent in this action, is located on a long, narrow island bounded on the east by the Atlantic Ocean and on the west by the waters of Little Egg Harbor Bay. Throughout its entire history this municipality, like many seashore communities, has been forced to wage a continuous war against the inroads of the sea.

On March 6, 1962, a severe and devastating storm struck this island causing extensive loss of property and life. Many inhabitants were evacuated as the ocean seas swept across the island and rushed into the bay. For many months following the storm, the efforts of the municipal officials were devoted to the immediate problems caused by this disaster. The near total destruction of the beaches

and sand dunes, the only barriers against the sea, left all the communities on Long Beach Island vulnerable to the whim of the Atlantic Ocean. In order to preserve and protect those remaining barriers and to promote the rebuilding of the dunes by natural means, the Respondent enacted the ordinances in question.

On July 31, 1962, the Borough of Beach Haven adopted Ordinance No. 62-10 entitled "An Ordinance Restricting Fences and Other Structures on Private Beaches in the Borough of Beach Haven and Providing Penalties for Violation Thereof." This enactment was amended by Ordinance No. 62-14 on October 23, 1962. The Comprehensive Beach Protection Ordinance No. 63-4 was adopted April 23, 1963, and amended on May 28, 1963, by Ordinance No. 63-5. On October 17, 1964, Ordinance No. 63-4 was further amended by Ordinance No. 64-17.

The Petitioners claim ownership to several lots as shown on "Plan of Subdivision of Beach Haven, Island of Long Beach, Ocean County, New Jersey, Beach Haven Heights Company." They also claim certain property rights eastwardly of their lot lines as shown on this map, together with rights in several streets adjoining their premises.

The Respondent acknowledges the Petitioners ownership of the lots as described in the Petition with reference to the lot and block numbers as the same appear on the above map. Any further allegations of Petitioners with respect to title by accretion or their rights to use Kentford, Leeward, Merivale, Nelson, and Beach Avenues to the exclusion of all others are denied.

F

Not applicable to this brief

G

Argument

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor . . ." Rule 19, 28 U. S. C. A. One such special reason is where a state court has decided a federal question of substance not theretofore determined by this Honorable Court, or has decided it in a way probably not in accord with applicable decisions of this Court. Rule 19(1)(a) 28 U. S. C. A.

The case at bar certainly does not present a substantial federal question never before passed upon. The problem of how far a governmental agency may restrict the use of an individual's lands without breaking the constitutional mandates against taking without compensation has been the subject of innumerable decisions. No rigid rules can be laid down to distinguish compensable losses from non-compensable losses. Each case must be judged on its own facts. *United States* v. *Caltex, Inc.*, 334 U. S. 149, 97 L. ed. 157 (1952).

Petitioners cannot be heard to say that a New Jersey municipality lacks authority to regulate its beach front under its police powers. N. J. R. S. 40:48-1 specifically empowers a municipality to make and enforce ordinances to:

> "Fix and determine the lines of bulkheads or other works or structures to be erected, constructed or maintained by the owners of lands facing upon any navigable water in front of their lands . . . and to designate the materials to be used, and the type, height and dimensions thereof."

Various other statutes have been enacted by our legislature relating to the protection of the beach front and police power in general. N. J. R. S. 40:92-9 provides:

> "The governing body of any borough may protect its ocean or beach front from encroachment by the

sea by the construction, erection, building, rebuilding, maintenance and repair of bulkheads, jetties and other works and structures for the protection thereof along the Atlantic Ocean. Such improvements or works may include the filling in and grading of land around and about any bulkhead, work or other structure to such grade as may be established by the borough, necessary to maintain and preserve the same. Such improvements, repairs and structures may be made and erected both above and below high water line."

N. J. R. S. 40:56-1 states in part:

"Any municipality may undertake any of the following works as a local improvement; and the governing body thereof may make, amend, repeal and enforce ordinances for carrying into effect all powers granted in this section:

(h) The improvement or reimprovement of any beach or water front, and the providing of suitable protection to prevent damage to lands or property by the ocean or other waters, including the filling in and grading necessary for the protection of such improvements."

N. J. R. S. 40:48-2 contains an additional grant of power. It provides:

"Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."

Nor must the municipality wait until the eleventh hour before acting to safeguard the welfare of the community. In *City of Newark* v. *Charles Realty Co.*, 17 N. J. Super 351 (Cty. Ct. 1952) an ordinance requiring adequate

heating facilities to protect plumbing fixtures from freezing was under attack. In answer to Plaintiff's contention that the Defendant was without power to act in advance Judge Francis said:

> "The contention that the city may not exercise its police power until harm has befallen lacks legal soundness. The major exercise of that power has always been in the field of prevention, to avert the occurrence of conditions that might put the well-being of the community to hazard. There is no appeal in the proposition that in a climate where freezing temperatures are frequently encountered, the city must stand by, helpless and without power to avoid the insanitary conditions that will certainly follow the freezing of unprotected water closets."

Apt expression of the power of a municipality to ward off the occurrence of dangerous conditions is found in the case of *Fenton* v. *Atlantic City,* 90 N. J. L. 403 (Sup. Ct. 1917) where the Court stated at page 406:

> ". . . it is a proper exercise of police power in the interest of public health, as well as its duty, to prevent a condition likely to be detrimental as much as it is to abate such condition after its evil consequences appear . . ."

Numerous cases need not be cited to establish the general principle of law applicable to this issue. Private property may not be "taken" for public use without just compensation. The difficulty lies not in stating the principle of law but in applying the same to the ordinances under attack. As Justice Heher pointed out in *Grosso* v. *Board of Adjustment of Millburn,* 137 N. J. L. 630 (S. Ct. 1948) whether the particular enactment constitutes a taking is a question of degree and therefore cannot be disposed of by general propositions.

Before approaching the case sub judice a firm and clear understanding of the concept of "police power" is essen-

tial. The term is not one of clearly ascertained legal principle, but a term of convenience, historically originating and expanding to describe legitimate local power. It is not something which is rigid and definitely fixed, on the contrary, in its very nature it must be considerably elastic to meet the changing and shifting conditions of our society.

The lawful exercise of the police power necessarily interferes in some respects with the liberty of the citizen such as in his right to use his property. This interference is justified on the ground and only to the extent that it is required in order to protect the personal and property rights of others and advance the best interests of society. A distinguishing characteristic of the police power is that it is a reasonable preference of public over private interests. *Miller* v. *Schoene,* 276 U. S. 272, 72 L. Ed. 568 (1928). The Court therein stated, "... and where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."

Thus, the question in essence reduces itself to one of fact, to wit; whether the impact of the regulations imposed by the ordinances in question as applied to Petitioners deprives them of the beneficial use of their lands. In this regard, the burden of proof lies upon Petitioners to show that the [redacted] constituted an unreasonable exercise of the P[redacted]ice power. *Goldblatt* v. *Hempstead,* 369 U. S. [redacted] 2d 130 (1962). The Supreme Court of New Jersey unanimously determined that Petitioners failed to adduce proof of some present or potential beneficial use of which they have been deprived.

The case of *Goldblatt* v. *Hempstead, supra,* included a review of a town ordinance prohibiting excavations below two feet above maximum ground level. The property owners contended that the ordinance in question took their property without due process of law in violation of the

Fourteenth Amendment. Mr. Justice Clark delivered the opinion of the Court. He stated in part that:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."
>
> Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature . . .' E.g., Sproles v. Binford, 286 U. S. 374, 388, 76 L. ed. 1167, 1179, 52 S. Ct. 581 (1932).
>
> The ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.

Upon reviewing the record, this Honorable Court concluded that the evidence produced failed to meet the burden of proof necessary to determine that the ordinance constituted an unreasonable exercise of the town's police powers.

With the foregoing authorities in mind, the Court's attention is invited to the specific ordinances in question.

A. Ordinance 62-10 as amended by Ordinance 62-14. These two ordinances, in short, prohibit the erection of fences, walls, posts, piling, stakes or structures which will interfere with the performance of beach protection work by public officials or employees without first obtaining a permit from the Board of Commissioners of Respondent

Borough. They do not, as Petitioners contend, "compel the plaintiffs to allow the public to use the land which they owned." Such a contention is no more than a blatant effort to read into these ordinances language which does not appear therein. Having done this Petitioners then cite numerous cases involving completely different factual situations and proceed to argue that these cases indicate Ordinances 62-10 and 62-14 take their property and give it to others. Petitioners even go farther and state unequivocally that these ordinances compel them to share the possession, use and enjoyment of their property with the public and with representatives of the Respondent.

These ordinances neither expressly nor impliedly purport to legislate with respect to any other subject matter than that set forth in their Titles, i.e., to restrict fences and other structures on private beaches. They do not give the public free use of Petitioners' beaches. They do not even absolutely prohibit the erection of fences and the like. All that is required is for one to obtain a permit prior to construction. Is this such an unreasonable request? If random construction of fences and structures were permitted, municipal vehicles and other equipment would be completely disabled in times of emergency. By requiring a permit the Respondent will have advance notice of the location, size and extent of fencing, etc., and may plan its emergency operations accordingly.

It is submitted that Ordinance 62-10 as amended by Ordinance 62-14 constitutes a legitimate and valid exercise of the Respondent's police power pursuant to N. J. R. S. 40:48-2.

B. Ordinance 63-4 as amended by Ordinance 63-5 and Ordinance 64-17. Ordinance 63-4 was enacted in accordance with the findings and declarations as set forth in section 2 thereof. It is an attempt to preserve the Respondent's only means of survival against the ravages of nature by regulating certain conduct within defined areas on the oceanfront. The destructive fury of the March 1962 storm

threatened the very existence of the communities on Long Beach Island. The functions of sand dunes changed from one of aesthetic beauty affording recreation for children and adults alike to one of survival. Sand became as valuable an element as the precious metals.

In order to accomplish the foregoing, these ordinances in short establish a building line and a bulkhead line. They also regulate the type of construction permitted eastwardly of the Building line and prohibit certain activity such as sand removal and indiscriminate crossing of the dunes.

As previously indicated, N. J. R. S. 40:48-1 specifically authorizes a municipality to fix and determine bulkhead and building lines on beach fronts. The necessity for such legislation is supported by the Borough engineers' uncontradicted testimony as to dangers of constructing homes east of the building line as established by Ordinance 64-17. Such a house, if destroyed in a storm, would carry away and endanger other properties; sewer and water lines would break, gas mains would be destroyed and roads washed away.

Petitioners contend that this ordinance deprives them of their right to construct whatever they might want to construct in this area. Is this any different from the common setback or building lines found in practically every well-planned community? The establishment of reasonable setback lines constitutes a proper exercise of the police power, since they tend to preserve the public health, add to the safety from fire and enhance the public welfare by bettering living conditions. There is no physical taking of property in a legal sense in the imposing of such lines, although the owner is deprived of part of his land for the purpose of building. *Bissell* v. *Town of Bethel,* 113 Conn. 323, 155 Atl. 232; 7 McQuillin 24.541 at pages 527 and 528. Furthermore, municipal building codes and ordinances generally must relate to the future, excepting provisions relat-

ing to repairs, reconstruction and alterations. 7 McQuillin 24, 512.

It is unfortunate that the beach in front of the Petitioners' property has eroded to its present position. But this is a risk any purchaser of water-front property assumes. His land may be reduced in area due to encroachments of the sea where it is no longer safe to build on as in the case at bar.

Paragraphs A, B, and C of Section 4 of Ordinance 63-4 set forth permitted construction applicable to the beach-dune area as defined in Section 3 thereof and in Section 1, Paragraph B of Ordinance 64-17.

Protective works, boardwalks, steps, sand fences, pavilions or similar platforms and bulkheads are permitted providing the same conform to the standard specified therein.

Paragraph D of Section 4 merely provides for access to the open beach. It does not prohibit access nor does it terminate an individual's right to use and enjoy the open beach.

Paragraph E concerns itself with the critical dune area. This sub section is intended to prevent persons from climbing upon and crossing the dunes except on existing walkways or for the purpose of protecting the same. Engineer William Taylor's testimony at the trial established beyond question the harmful effect of continued trespass upon sand dunes.

Only a word need be said with respect to the rules of construction relating to Ordinances in general. Ordinances should be reasonably and liberally construed in order to give to them the effect intended. *City Affairs Committee of Jersey City* v. *Board of Commissioners of Jersey City*, 132 N. J. L. 180, aff. 134 N. J. L. 552 (E. & A. 1946). The pre-

sumption of reasonableness, validity and constitutionality of legislation is fully applicable to measures enacted under the police power and courts indulge in not only every legal presumption but every reasonable inference of fact in favor of the validity of police legislation. The burden is always upon the one who denies the validity or constitutionality thereof. 6 McQuillin, sec. 24.31. Where there are two possible interpretations of a statute or ordinance, by one of which the law would be unconstitutional, and by the other it would be valid, a court should adopt the construction which will uphold the law. *Adams Newark Theatre Co.* v. *City of Newark*, 22 N. J. 472 (1956), aff. 354 U. S. 931.

Petitioners further contend that Respondent's ordinances do not contain sufficiently definite standards so as to meet constitutional requirements. In an effort to sustain their position, Petitioners have repeated the various definitions set forth in Section 3 of Ordinance 63-4 in such a manner so as to create the impression of total confusion and mass contradiction.

Attention is called to Ordinance 64-17 which amends Ordinance 63-4. This ordinance adopts a Bulkhead and Building Line as shown on a map prepared by the Respondent's Engineer and which is on file in the Office of the Borough Clerk. All anyone need do is but glance at this map in order to determine the effect of these ordinances upon his property. No one is required to speculate at the peril of life, liberty, or property. The exact and precise location of the beach-dune area is readily ascertainable. It constitutes all that area lying eastwardly of the Building Line as shown on the above map.

The fact that the language used leaves some determination to be made by the official who is to administer the ordinance does not render the ordinance void. In *State* v. *New York Central Railroad Co.*, 37 N. J. Super. 42 (App. Div. 1955) a penal ordinance of the Borough of Dumont,

proscribed "loud and unnecessary noise which, disturbs the public peace." The elasticity of the word 'unnecessary' was similarly made a point of attack as are the words "adequately" and "satisfaction of the borough engineer" in this ordinance. The ordinance was ultimately upheld. Judge Conford discussed the use of general language in ordinances, concluding that:

> "Where the legislative regulatory object is appropriate and the conduct intended to be prohibited is not fairly susceptible of definition in other than general language, there is no constitutional impediment to its use. State v. New York Central Railroad Co., supra."

The case of *Kovacs* v. *Cooper*, 336 U. S. 77, 93 L. ed. 513, reh. den. 336 U. S. 921, 93 L. ed. 1083 (1949) involved an appeal from a judgment of the Court of Errors and Appeals of the State of New Jersey affirming a conviction of violating an ordinance prohibiting the operation upon the city streets of vehicles equipped with sound amplifiers which emit loud and raucous noises.

The defendant contended that the ordinance was vague, obscure, and indefinite as to be unenforceable. The objection centered around the use of the words "loud and raucous." Mr. Justice Reed in speaking for this Honorable Court stated that while these words are abstract words, they have through daily use acquired a content that conveys to any interested person . . . a sufficiently accurate concept of what is forbidden.

As demonstrated above, the Beach Protection Ordinances are a valid exercise of the police power enacted for the general health, safety and welfare of the community. The definitions of "dune line" and "beach", etc., must necessarily be in general language for the very nature of sand dunes connotes a shifting and unstable mass of sand, subject to the whim of the sea and wind. The enunciation of a plan to protect and project the useful existence of this

sometimes "natural" barrier, a plan to insure that it will always be a barrier, must be general.

The precision of a mathematical formula in promulgating standards is not a constitutional mandate.

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Conclusion

The petition for a writ of certiorari should be denied for the following reasons:

1. No substantial federal question is involved.

2. The case below in essence turned on a question of fact decided adversely to the Petitioners, to wit; whether the ordinances in question deprived Petitioners of the beneficial use of their land.

3. The case involves questions which must be decided upon the facts of each case.

4. Petitioners were afforded an opportunity to avail themselves of further proceedings based upon a claim and showing of an actual taking of a beneficial use.

Respectfully submitted,

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